TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 127

LOCAL 1976, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A.F.L., ET AL., PETITIONERS,

vs.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 13, 1957
CERTIORARI GRANTED OCTOBER 14, 1957

No. 15026

United States

Court of Appeals

for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

LOCAL 1976, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL., AND LOS ANGELES COUNTY DISTRICT COUNCIL OF CARPENTERS and NATHAN FLEISHER,

Respondents.

Transcript of Record

Petition for Enforcement of Order of the National Labor Relations Board

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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GENERAL COUNSEL'S EXHIBIT No. 1-A

United States of America

National Labor Relations Board

CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENT

Case No. 21-CC-189. Date filed 8/25/54.

* * * * *

1. Labor Organization or its Agents Against Which Charge Is Brought:

Name: 1. Carpenters District Council of Los Angeles County; 2. United Brotherhood of Carpenters, Joiners and Helpers, Local 1976; 3. United Brotherhood of Carpenters, Joiners and Helpers of America; 4. Business Agent, Fleisher of Local 1976.

Address: 1. 2200 West 7th, Los Angeles, California; 2. 2526½ Brooklyn, Los Angeles, California; 3. 222 East Michigan, Indianapolis, Indiana; 4. 2526½ Brooklyn, Los Angeles, California.

The above-named organizations or its agents have engaged in and are engaging in unfair labor practices within the meaning of Section (8b) Subsections 8 (b) (4) (A) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge:

The above named labor organizations and their agents on August 17, 1954 ordered certain employees of Havstad and Jensen Co., hereinafter called Hav-

stad, to strike and refuse to handle materials supplied Havstad by Sand Door and Plywood Co., hereinafter called Sand, an object thereof being to force Havstad to cease doing business with Sand.

3. Name of Employer: Sand Door and Plywood Co.

4. Location of Plant Involved: 1049 East Slauson, Los Angeles, California.

5. Type of Establishment: Wholesaler.

6. Identify Principal Product or Service: Jobber of plywood doors and allied Building materials.

7. No. of Workers Employed: 12.

8. Full name of Party Filing Charge: Sand Door and Plywood Company.

9. Address of Party Filing Charge: 1049 East Slauson, Los Angeles, California. (Please send copies of all correspondence and pleadings to Howard F. LeBaron, 111 W. 7th Street, Rm. 1024, Los Angeles, Calif.)

10. Tel. No.: ADams 3-4371.

11. Declaration:

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

8/25/54

/s/ JAMES C. BARRON,
Vice President and General Manager

Affidavit of Service and Postal Return Receipts attached.

GENERAL COUNSEL'S EXHIBIT No. 1-C

United States of America

Before the National Labor Relations Board
Twenty-First Region
Case No. 21-CC-189

LOCAL 1976, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL, its agent, NATHAN FLEISHER, AND DISTRICT COUNCIL OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA OF LOS ANGELES COUNTY,

and

SAND DOOR AND PLYWOOD CO.

COMPLAINT

It having been charged by Sand Door and Plywood Company that Local 1976, United Brotherhood of Carpenters and Joiners of America, AFL, its agent, Nathan Fleisher and District Council of the United Brotherhood of Carpenters and Joiners of America, of Los Angeles County, herein called Respondents, have engaged in and are engaging in unfair labor practices affecting commerce as defined in the National Labor Relations Act, as amended, Public Law 101, 80th Congress, First Session, hereinafter called the Act, the General Counsel of the National Labor Relations, on behalf of the Board, by the Acting Regional Director for the Twenty-First

Region, designated by the Board's Rules and Regulations, Series 6, as amended, Section 102.15, hereby issues this Complaint and alleges as follows:

1. Sand Door and Plywood Company (herein called Sand), a California corporation, is engaged in Los Angeles, California, in the business of wholesale jobber of doors, plywood and allied building materials. In addition Sand is the exclusive Southern California sales agency for Paine Lumber Company of Oshkosh, Wisconsin (herein called Paine). Sand annually purchases and causes to be shipped to it from outside the State of California, goods and materials valued at in excess of $750,000.

2. Paine manufactures a special type of door known in the trade as "Paine Rezo Doors," used principally in hospitals and institutions. Paine annually ships Paine Rezo doors valued in excess of $500,000 from its factory in Oshkosh, Wisconsin to Sand in Los Angeles, California.

3. Watson and Dreps are retailers and contractors of building materials, specializing in institutional buildings. Among other materials Watson and Dreps purchases Paine Rezo doors from Sand.

4. Havstad and Jensen Co. (herein called Havstad & Jensen) is a partnership composed of L. C. Havstad and Emmet R. Jensen, which is engaged in the business of general contracting in the building and construction industry.

5. At all times material, Havstad & Jensen has been engaged as general contractor in the construction of the College of Medical Evangelists connected with the White Memorial Hospital in Los Angeles,

California (herein called the college project). In connection with this project, Havstad & Jensen contracted to purchase Paine Rezo doors from Watson and Dreps.

6. All of the business entities named in paragraphs 1 through 4 hereof are employers within the meaning of the Act, and Sand and Paine are, and at all times material herein have been, engaged in commerce within the meaning of Section 2, subsections (6) and (7) of the Act.

7. Respondents Local 1976, United Brotherhood of Carpenters and Joiners of America, AFL, (herein called Local 1976) and District Council of the United Brotherhood of Carpenters and Joiners of America of Los Angeles County (herein called Council), are labor organizations within the meaning of Section 2 (5) of the Act.

8. At all times material herein, Respondent Nathan Fleisher has been business agent of Respondent Local 1976 and its agent within the meaning of Sections 2 (13) and 8 (b) of the Act.

9. At all times material herein, Respondent Local 1976 has been a constituent member of and affiliated with Respondent Council.

10. At all times material herein, the carpenters employed by Havstad & Jensen on the college project have been members of or represented for collective bargaining purposes by Respondent Local 1976.

11. Paine Rezo doors do not bear the union label of Respondents, their parent organization or any local union affiliated with it or them.

12. Since on or about August 17, 1954, Respond-

Los Angeles County, hereafter referred to as respondents, and separately and severally answering the complaint on file in the above entitled matter for themselves and for no others, admit, deny and allege as follows:

1. Answering paragraph 1 of the complaint, respondents and each of them are without knowledge or information upon which to have a belief as to the allegations therein contained, and basing their several and separate answer on these grounds, deny each and every allegation therein contained.

2. Answering paragraph 2 of the complaint, respondents and each of them are without knowledge or information upon which to have a belief as to the allegations therein contained, and basing their several and separate answer on these grounds, deny each and every allegation therein contained.

3. Answering paragraph 3 of the complaint, respondents and each of them are without knowledge or information upon which to have a belief as to the allegations therein contained, and basing their several and separate answer on these grounds, deny each and every allegation therein contained.

4. Answering paragraph 4 of the complaint, respondents and each of them are without knowledge or information upon which to have belief as to the allegations therein contained, and basing their several and separate answer on these grounds, deny each and every allegation therein contained.

5. Answering paragraph 5 of the complaint, respondents and each of them admit that Haystad &

Jensen have been engaged as general contractors in the construction of the College of Medical Evangelists connected with the White Memorial Hospital in Los Angeles, California. Respondents and each of them are without knowledge or information upon which to base a belief as to the allegation that Havstad & Jensen in connection with the aforementioned building project contracted to purchase Paine Rezo Doors from Watson & Dreps or any other source, and, basing their separate and several answer on these grounds, deny said allegation, and each and every other allegation therein not herein specifically admitted.

6. Answering paragraph 6 of the complaint, respondents and each of them deny generally and specifically each and every allegation therein contained.

7. Answering paragraph 7 of the complaint, respondents and each of them admit all allegations therein.

8. (a) Answering paragraph 8 of said complaint, respondent, Local 1976, admits that Nathan Fleisher at all times mentioned in the complaint has been and is the Business Agent of Local 1976, but alleges that such powers and duties of the said Fleisher are limited and are only such as are delegated by Local 1976 as an autonomous unincorporated association, and denies each and every other allegation contained in said paragraph.

(b) Answering paragraph 8 of the complaint, respondent, District Council of the United Brotherhood of Carpenters and Joiners of America of Los

Angeles County, on information and belief admits that Nathan Fleisher has been the Business Agent of Local 1976, but avers that it has no information or belief as to whether the said Fleisher is an agent of Local 1976 within the meaning of Section 2(13) 8(b) 10(1) of the National Labor Relations Act as amended, and basing its answer upon such lack of information and belief denies generally and specifically said allegation and all other allegations therein contained and not specifically admitted herein.

9. Answering paragraph 9 of the complaint, respondents and each of them admit the allegations therein contained.

10. Answering paragraph 10 of the complaint, respondents and each of them on information and belief admit the allegations therein contained.

11. Answering paragraph 11 of the complaint, respondents and each of them are without knowledge or information in which to have a belief as to the allegation therein contained, and basing their separate and several answer on these grounds deny each and every allegation therein contained.

12. Answering paragraph 12 of the said complaint, respondents and each of them deny each and every allegation therein contained.

13. Answering paragraph 13 of the complaint, respondents and each of them deny generally and specifically each and every allegation therein contained.

14. Answering paragraph 14 of the complaint, respondents and each of them separately and severally deny each and every allegation therein contained.

15. Answering paragraph 15 of the complaint, respondents and each of them separately and severally deny each and every allegation therein contained.

16. Answering paragraph 16 of the complaint, respondents and each of them separately and severally deny each and every allegation therein contained.

17. Answering paragraph 17 of the complaint, respondents and each of them separately and severally deny each and every allegation therein contained.

As and for a second, separate and further defense, respondents allege:

1. Reallege and incorporate herein by this reference as though fully set forth paragraphs 1 through 17 of their first defense.

2. Allege that the National Labor Relations Board does not have jurisdiction over the subject matter of the complaint or the persons of the respondents.

As and for a third, separate and further defense, respondents allege:

1. Reallege and incorporate herein by this reference as though fully set forth paragraphs 1 through 17 of their first defense.

2. Allege that the National Labor Relations Act as amended and the relief sought by the complaint herein were unconstitutional and void in that each of them contravene the provisions of the First, Fifth and Thirteenth Amendments of the Constitution of the United States of America.

Wherefore, having fully answered the complaint

herein, the respondents pray that the complaint be in all things dismissed, and for such other and further relief as the Board deems proper.

ARTHUR GARRETT and
JAMES M. NICOSON

/s/ By ARTHUR GARRETT,
Attorneys for Respondents

Duly Verified.

Affidavit of Service by Mail attached.

GENERAL COUNSEL'S EXHIBIT No. 1-G

United States of America

National Labor Relations Board

FIRST AMENDED CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

Case No. 21-CC-189. Date Filed: 10/15/54.

* * * * *

1. Labor Organization or its Agents Against Which Charge Is Brought:

Name: 1. Local 1976, United Brotherhood of Carpenters and Joiners of America, AFL; 2. Business Agent Nathan Fleisher of Local 1976; 3. District Council of the United Brotherhood of Carpenters and Joiners of America of Los Angeles County.

Address: 1. 2526½ Brooklyn, Los Angeles, California; 2. 2526½ Brooklyn, Los Angeles, California; 3. 2200 West 7th Street, Los Angeles, California.

The above-named organizations or its agents have engaged in and are engaging in unfair labor practices within the meaning of Section (8b) Subsections 8 (b) (4) (A) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge:

Since on or about August 17, 1954, the above-named labor organizations and their agents have instructed, induced and encouraged employees of Havstad and Jensen to engage in a strike or concerted refusal in the course of their employment to use, transport, or otherwise handle or work on any goods, articles, materials or commodities of Paine Lumber Company or Sand Door and Plywood Company, an object thereof being to force or require Havstad and Jensen to cease using, handling, transporting or otherwise dealing in the products of Paine or Sand or to cease doing business with Paine or Sand.

3. Name of Employer: Sand Door and Plywood Co.

4. Location of Plant Involved: 1049 East Slauson, Los Angeles, California.

5. Type of Establishment: Wholesaler.

6. Identify Principal Product or Service: Jobber of plywood doors and allied building materials.

7. No. of Workers Employed: 12.

8. Full Name of Party Filing Charge: Sand Door and Plywood Company.

9. Address of Party Filing Charge: 1049 East Slauson, Los Angeles, California. (Please send copies of all correspondence and pleadings to Howard F. LeBaron, 111 W. 7th Street, Rm. 1024, Los Angeles, Calif.)

10. Tel. No.: ADams 3-4371.

11. Declaration:

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

October 15, 1954.

/s/ JAMES C. BARRON,
Vice President and General Manager

Affidavit of Service and Postal Return Receipts attached.

GENERAL COUNSEL'S EXHIBIT No. 1-H

[Title of Board and Cause.]

AMENDMENT TO COMPLAINT

An amended charge having been filed subsequent to the issuance of the Complaint herein, the Acting Regional Director hereby amends the Complaint by adding the words "induced and encouraged" to follow the word "instructed" in the second line of paragraph 12 on page 3 thereof.

A copy of the amended charge is attached hereto.

Dated at Los Angeles, California, this 15th day of October, 1954.

[Seal] /s/ DANIEL J. HARRINGTON,
Acting Regional Director, National Labor Relations Board, Twenty-First Region

Affidavit of Service and Postal Return Receipts attached.

[Title of Board and Cause.]

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Statement of the Case

Upon a charge filed by Sand Door and Plywood Co., herein called Sand Door, the General Counsel of the National Labor Relations Board issued a complaint dated September 24, 1954, against Local 1976, United Brotherhood of Carpenters and Joiners of America, AFL, herein called Local 1976; its agent, Nathan Fleisher, and Los Angeles County District Council of Carpenters, AFL,[1] herein called the District Council; alleging that Local 1976, Nathan Fleisher, and the District Council, herein collectively called Respondents, had engaged in and were engaging in unfair labor practices within the meaning of Section 8 (b) (4) (A) and Section 2 (6) and (7) of the National Labor Relations Act, 61 Stat. 136, herein called the Act.

[1] As corrected by stipulation at the hearing.

In respect to unfair labor practices, the complaint alleges that the Respondents instructed, induced, and encouraged employees of Havstad & Jensen, a partnership engaged in the business of general contracting in the building and construction industry, to refuse to install doors manufactured by Paine Lumber Company, Oshkosh, Wisconsin, a product distributed in Southern California by Sand Door.

Respondents' answer denies the commission of unfair labor practices, and asserts that the National Labor Relations Board lacks jurisdiction over the subject matter of the complaint and the persons of the Respondents.

Pursuant to notice a hearing was held before the undersigned in Los Angeles, California, from October 18 through 22, 1954. All parties were represented by counsel and were permitted to examine and cross-examine witnesses, and to introduce evidence pertinent to the issues. A brief has been received from counsel for the Respondents and from counsel for Sand Door.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

Findings of Fact

I. The business of the employers:

Sand Door is a California corporation engaged in and about Los Angeles, California, in wholesale jobbing of doors, plywood, and allied building materials. Sand Door is the exclusive Southern California sales agency for Paine Lumber Company, Osh-

kosh, Wisconsin, herein called Paine. In 1953 Sand Door received from Paine materials, including doors, having a value of $185,696.84. From January 1, 1954, through September 8, 1954, Sand Door received materials, including doors, from Paine to the value of $103,503.05. All such shipments were made direct to Sand Door from Wisconsin. In early August 1954 Sand Door received a shipment of doors from Paine having a value of approximately $9,000. These doors were purchased for Watson & Dreps, mill work contractors in Los Angeles, who took delivery at the Sand Door warehouse.

Havstad & Jensen are joint adventurers who since July 1, 1952, have been engaged in the construction of a hospital called White Memorial Hospital for a religious organization, the College of Medical Evangelists. In mid-August Havstad & Jensen received at the building project 398 doors which Paine had shipped to Sand Door earlier that month and which Havstad & Jensen had purchased from Watson & Dreps. Emmett R. Jensen, who with Havstad constitutes the business entity doing the construction work at the hospital, is a member of Building Contractors Association of Southern California, herein called BCA. Since 1933 or 1934, in behalf of Jensen and other members, BCA has negotiated labor contracts with Respondents' parent, United Brotherhood of Carpenters and Joiners of America, herein called Carpenters. The latest such contract was effective May 1, 1951. Havstad & Jensen have been governed in respect to carpenter labor by the terms of this agreement.

Altmans Construction Company, also a member of BCA, in 1953 performed construction work at a tire plant of B. F. Goodrich and Company in Los Angeles having a value in excess of $745,000.

In 1953 B. F. Goodrich Rubber Company shipped from its Los Angeles plant to States other than California rubber products having a value in excess of $4,500,000.

II. The labor organization involved:

The Respondents Local 1976 and District Council are labor organizations within the meaning of Section 2 (5) of the Act. Nathan Fleisher is the business agent of Local 1976.

III. The unfair labor practices:

The essential facts are not in dispute. In August 1954 Sand Door received doors valued at about $9,000 from Paine and notified Watson & Dreps of their arrival. The doors were delivered to the hospital construction site by August 17 and laborers began distributing the doors from floor to floor. On that morning, Nathan Fleisher, business agent of Local 1976, came to the hospital and spoke to Arnold Steinert, carpenter foreman for Havstad & Jensen. Fleisher told Steinert that the doors could not be hung as they did not carry a union label. Steinert then directed the laborers to cease the distribution of the doors and in the presence of Fleisher told a carpenter, Sam Agronovich, to quit hanging the doors because they were not union-made. Agronovich was then assigned to other work. In a short time, James Nicholson, superintendent

for Havstad & Jensen, arrived at the job and learned that the doors were not being hung. Seeing Fleisher and a carpenter employee, Abe Finkelstein, standing together, Nicholson asked Fleisher why he had stopped the men from hanging the doors. Fleisher answered that he had orders from the District Council to do so until it could be established that the doors were union or non-union. Nicholson angrily told Sam Agronovich and Saul Agronovich, both carpenters and the latter steward for Local 1976 on the job, that they were laid off, but soon retracted his order and permitted the men to do other work. No individual employee was directly ordered by Nicholson or Steinert to hang doors after the visit of Fleisher.

In the meantime, James C. Barron, vice president and general manager of Sand Door, telephoned Earl Thomas, a representative of the District Council, and asked to be informed concerning the difficulty about the doors. Thomas said that he was not familiar with the matter, but would find out if the doors were union-made. The next day Barron again called Thomas, who said, "We can't hang non-union doors," and asked why Barron did not buy a union-made product. Barron also talked to Fleisher, who told him that because the doors did not have a union label they would have to be "cleared" before they could be hung. Emmett Jensen, who with Havstad constitutes the business entity known as Havstad & Jensen, also talked with Thomas, who told him that the doors were made by a company having no union connection.

Thereafter the Regional Director for the Twenty-first Region filed a petition in the U. S. District Court for the Southern District of California, seeking a temporary restraining order under Section 10 (1) of the Act. During the hearing on this matter, on October 4, the Court apparently inquired if a direct request or order had been made of or to the carpenter employees to hang the doors. In consequence of the Court's inquiry a representative of Sand Door telephoned Nicholson to suggest that such a course be followed. On October 5 Nicholson and Steinert asked each carpenter employee on the hospital job, separately, "Would you be willing to hang the doors?" Each replied in the negative. Steward Saul Agronovich answered in the presence of another carpenter employee, Lou Feldman, that he was not, without clearance from Local 1976; Feldman said he would be glad to do so if the doors were cleared; and another carpenter, Charles Franklin, gave substantially the same reply. Of the two remaining carpenter-employees, Shand said that he did not intend to "get his neck in a sling," and Lokna said that he could not afford to do so.[2]

The constitution and by-laws of the Carpenters provide that where two or more local unions exist in a city they must be represented in a District Council composed exclusively of delegates from such local unions and governed by such laws and trade

[2] Questioning of the individual employees in this context is characterized in Respondent's brief as a "questionable procedure." I find no impropriety in it.

rules adopted by the District Council with the approval of the constituent locals. The District Council, Respondent here, has as constituents local 1976 and a number of other locals in the Los Angeles area. Among the by-laws and trade rules of the District Council is one reading:

No member shall use, handle, install or erect any material produced or manufactured from wood that is not produced and manufactured by members of the United Brotherhood of Carpenters and Joiners of America.

A further provision states:

It shall be the duty of every member who knows of any member violating any of the by-laws or trade rules to prefer charges in the District Council against this member.

Finally, it is provided that all business representatives of the locals work under the supervision and direction of the District Council. For this reason and because on August 17 Fleisher was acting to implement the trade rules and by-laws of the District Council, I find him to be an agent both of the District Council and of his direct employer, Local 1976.

The first point for decision concerns the jurisdictional aspect of the case. In determining whether the Board will assert jurisdiction in cases involving allegations of secondary boycott, the operations of the primary employer, which here would be Haystad & Jensen, are first considered. If the impact on commerce under Board standards is sufficient for assertion of jurisdiction, no further inquiry is necessary. Clearly the operations of Haystad & Jensen do not

affect commerce so as to satisfy the Board's requirements. In such a situation the Board has held that the operations of the secondary employers, to the extent that they are affected by the alleged unlawful boycott, must be viewed. Here we find that the business of Paine and Sand Door are directly affected. Although it is clear that if the Respondents' boycott action is confined to the hospital being constructed by Havstad & Jensen, the diminution in shipments by Paine and receipts by Sand Door would be slight, the by-laws of the District Council urge and perhaps even direct members of the constituent locals to refuse to work on wood articles not made by their union. A representative of the District Council, Earl Thomas, suggested to Sand Door that the difficulty might be solved if the latter would buy union-made doors. Obviously, it is Respondents' announced purpose and policy to discourage its members from handling or using disapproved wood products. If Respondents are successful in this respect Paine will find no distributor for its doors in and around Los Angeles and Sand Door will find no purchasers in that area—with the result that interstate shipments in excess of $185,000 annually will cease. I consider this a sufficient predicate for the assertion of jurisdiction, and Respondents' defense based upon such grounds is found to be without merit.

Respondents point to the lack of evidence to show that Fleisher or any such representative instructed any carpenter employee to cease hanging doors. It is clear, of course, that Foreman Steinert told Agronovich to stop hanging the doors because they were not union-made and that Fleisher was present when this

direction was given. Again, in the presence of Finkelstein, Fleisher said that he had orders from the District Council to stop the door hanging. Finkelstein could have entertained no doubt about Respondents' desire and Agronovich must have received the same impression. But these are not the only instances where the Respondents in my opinion have induced and encouraged employees to refuse to hang the doors. The by-laws and trade rules of the District Council set forth above constitute a clear direction to them in such matters. Further inducement and encouragement is found in the language of the contract under which both Havstad & Jensen and the Respondents have status as parties. The pertinent section there recites: "Workmen shall not be required to handle non-union material."

Another point to which Respondents address themselves is that no language of Fleisher, which might be interpreted as inducement or encouragement, was made in the presence of more than one employee. This appears to be the fact. The Board has held, with Court approval, that in order to amount to a violation of Section 8 (b) (4) (A) of the Act, the prohibited inducement and encouragement must involve more than one employee, on the theory that a single employee may not act or be induced to act in concert.[4] In the Glaziers' case it appears that only one employee was working on the job at the time that the conduct complained of occurred and the impossibility of concerted activity

[4] Glaziers' Union Local No. 27, 99 NLRB 1391.

existed because of that circumstance. Here the possibility of concerted action exists because of the greater number of employees. The Act would appear not to require inducement and encouragement of more than one employee if he has fellow workers with whom he might act in concert. It seems entirely reasonable to me to hold that inducement and encouragement of a single employee in the reasonable expectation that the message be carried to others would sufficiently satisfy the literal meaning of Section 8 (b) (4) (A). Even aside from the conduct of Fleisher, the trade rules and by-laws of the District Council were of course directed to all members and thus to all of the carpenter employees of Haystad & Jensen.

Because of the conduct of Fleisher described above, because of the trade rules and by-laws of the District Council, and because of the reservation in the collective bargaining contract of a right to refuse to work on non-union material; I find that the Respondents have induced and encouraged employees of Haystad & Jensen to refuse to hang the Raine doors.

The only remaining questions are whether the refusal occurred in the course of employment and whether Respondents' action is placed beyond the reach of remedial action because of the collective bargaining contract. In a somewhat similar case under similar contract provisions, the Board reasoned that employment, as defined by the contract, excluded from the required job duties any work on

"unfair goods." In dismissing the complaint the Board said:

> It cannot be said therefore that by causing the employees to exercise their contractual privilege the respondent induced a concerted refusal to work in the course of employment with an object of forcing any employer to cease doing business with any other person in violation of Section 8 (b) (4) (A) * * * We therefore find that the respondent did not violate Section 8 (b) (4) (a) of the Act by causing the employees of the various trucking carriers to exercise their contractual privilege of declining to handle Pittsburgh freight.

This appears to be the latest expression of the Board on the point, and as it purports to be an interpretation of the law sought to be applied here, it is binding upon me. Should I be mistaken in my appraisal of the decision and should the Board have intended there merely to fashion an appropriate remedy to fit peculiar and unique facts, it should be remembered then that in the case here for decision Sand Door and Paine were not parties to any contract with the Respondents and that the obvious purpose of the Respondents working through the employees of Haystad & Jensen was to bring to a stop the importation into Southern California of doors not made under conditions satisfactory to the Respondents. Haystad & Jensen constituted only a mi-

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[5] Chauffeurs, Teamsters, Warehousemen and Helpers Local Union No. 135, 105 NLRB 740.

nor outlet for that product. Whether by contract with a number of small employers a labor organization may effectively accomplish such a boycott obviously affecting other and larger employers throughout a wide geographical area, is a question which the Board may desire to reconsider. Were I free to apply the law to this case without binding precedent, I would find that a labor organization may not immunize itself from the interdictions of Section 8 (b) (4) (A) in such fashion. I know of no other situation cognizable by the Board under the Act where private arrangements are given such wide and affective sweep in apparent derogation of public policy.[6] Freedom to contract is precious but not without circumscription familiar to the law.[7]

The Board has held[8] that a refusal by employees to handle certain goods in a situation where by con-

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[6] Mackay Radio and Telegraph Company, Inc., 96 NLRB 740, 742.

[7] Cf. National Licorice Company v. N. L. R. B., 309 U. S. 350, particularly the following at pages 364 and 365: Obviously employers cannot set at naught the National Labor Relations Act by inducing their workmen to agree not to demand performance of the duties which it imposes * * * The effect of the Board's order, as we construe it, is to preclude the petitioner from taking any benefit of the contracts which were procured through violations of the Act, and which are themselves continuing means of violating it, and from carrying out any of the contract provisions, the effect of which would be to infringe the rights guaranteed by the National Labor Relations Act. (Emphasis supplied)

[8] Footnote [5] supra.

tract their bargaining representative has excluded from required job duties work on "unfair goods" is not a refusal "in the course of * * * employment" as that language is used in the Act. In the cited case and here the "unfair goods" were in no sense intrinsically objectionable. Hanging wooden doors is within *the within* the traditional skill of carpenters to which they claim exclusive right. By any ordinary meaning, it would seem that the task did indeed fall within the course of employment of the carpenters of Havstad & Jensen. At least one was hired for no other purpose. If hanging the Paine doors was not in the course of employment that was so only because of a contract provision designed to implement a purpose to boycott. But the decisional law seems clear in the matter and a dismissal of the complaint must follow.

I find upon the basis of the undisputed facts as outlined above and in accordance with precedential Board decisions that the Respondents induced and encouraged employees of Havstad & Jensen to refuse to handle or install doors manufactured by Paine; that an object of this refusal was to force or require Sand Door to cease doing business with Paine; that the refusal to handle or install by employees of Havstad & Jensen did not occur "in the course of employment"; that the collective bargaining contract to which Respondents and Havstad & Jensen are parties constitutes a consent on the part of Havstad & Jensen to such a refusal; and that therefore the Respondents have not violated Section 8 (b) (4) (A) of the Act.

It is therefore recommended that the complaint be dismissed in its entirety.

/s/ WALLACE E. ROYSTER,
Trial Examiner

Affidavit of Service and Return Postal Receipts attached.

[Title of Board and Cause.]

EXCEPTIONS OF CHARGING PARTY TO INTERMEDIATE REPORT

The charging party, Sand Door and Plywood Co., hereby excepts to the Intermediate Report and Recommendations in the above entitled matter as follows:

For that the Trial Examiner did find:[1]

Page 4, Line 9:

1. That no language of Fleisher, which might be interpreted as inducement or encouragement, was made in the presence of more than one employee.

For that the Trial Examiner did not find:

2. Steinert to be an agent of Respondents Local 1976 and District Council.

3. Agronovich to be an agent of Respondents Local 1976 and District Council.

4. That Agronovich induced and encouraged employees not to hang the doors.

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[1] References are to pages and lines of the Intermediate Report.

For that the Trial Examiner did not recommend that:

5. Jurisdiction should also be asserted on the ground that Jensen is party to a labor contract between Building Contractors' Association and Respondents herein.

6. Respondents be required to cease and desist their unfair labor practices.

7. Respondents be required to remedy their unfair labor practices.

Respectfully submitted,

/s/ HOWARD F. LeBARON,
For the charging party, Sand Door and Plywood Co.

Dated at Los Angeles this 28th day of January, 1955.

[Title of Board and Cause.]

EXCEPTIONS TO INTERMEDIATE REPORT

Comes now Counsel for the General Counsel and respectfully files the following exceptions to the Intermediate Report and Recommended Order of the Honorable Wallace E. Royster, Trial Examiner herein, issued December 13, 1954.

1. To the statement or finding of the Trial Examiner (I.R. p. 4, line 28) that Haystad & Jensen is the primary employer, and to the failure to find that the primary employer for the purposes of this case

is Paine Lumber Company, the manufacturer of the nonunion doors, which Respondents refused to install.

2. To the statement or finding of the Trial Examiner (I.R. p. 4, lines 31-32) that the operations of Havstad & Jensen do not satisfy the Board's requirements for the assertion of jurisdiction (I.R. p. 2, lines 33-50), and to the failure of the Examiner to consider as an additional basis for the assertion of jurisdiction, the commerce of all the members of Building Contractors Association of Southern California, of which Jensen is a member, because all such members are affected as secondary employers through the Association's contract with Respondents.

3. To the failure of the Trial Examiner to find (I.R. p. 3, lines 4-5) that Arnold Steinert, the carpenter foreman, was a member of Carpenters Local No. 563 (R. 91), a constituent member of Respondent District Council (G.C. Ex. 2, p. 37), and as such, subject to its By-Laws and Trade Rules (I.R. p. 3, line 54, p. 4, line 2).

4. To the failure of the Trial Examiner to find that the By-Laws and Trade Rules of Respondent District Council provide, inter alia:

"Instruction to Members" (p. 20)

All carpenter foremen must be members of Carpenters and Joiners of America; no foreman shall hire non-union carpenters, (Sections 16 (g) and 20 (a), pp. 23, 27.)

All foremen are to be held equally responsible (the same as the steward) for the enforcement of all By-

Laws and Trade Rules of this District Council. Violators of this paragraph shall be subject to a fine of $100 and/or expulsion. (Section 20 (f), p. 28.)

5. To the failure of the Trial Examiner to find that Arnold Steinert, the carpenter foreman of Havstad & Jensen, was acting as the agent of Respondents in accordance with the obligation imposed upon foremen by the aforementioned By-Laws and Trade Rules, when on August 17, 1954, Steinert, pursuant to directions from Nathan Fleisher, Respondents' agent, instructed the laborers employed by Havsted & Jensen to cease distributing the doors to the floors where they were to be hung, and told carpenter Sam Agronovich to quit hanging the doors because they were not union made.

6. To the failure of the Trial Examiner to find that Thomas, the secretary-treasurer of Respondent District Council, told Jensen that he had received a report that "Paine Lumber Company was not a union operation" and that "the carpenters would not be able to handle these doors" (Tr. 130).

7. To the failure of the Trial Examiner to find that since August 17, 1954, Havstad & Jensen has repeatedly but unsuccessfully attempted to hire carpenters to hang the disputed doors, to secure carpenters from Respondents for that purpose and to secure permission from Respondents to have the doors hung (Tr. 43, 51, 52, 77, 87, 117, 131).

8. To the findings of the Trial Examiner (I.R. pp. 5-6) that the clause in the collective bargaining contract between the Building Contractors Associa-

tion of Southern California and Respondents which provides:

Workmen shall not be required to handle non-union material.

excuses Respondents' violation of Section 8 (b) (4) (A) found by the Trial Examiner, and to the failure of the Trial Examiner to find that the aforesaid contract clause did not excuse Respondent's illegal conduct.

9. To the failure of the Trial Examiner to find that in any event, the violation engaged in by Respondents, in inducing the laborers employed by Haystad & Jensen to cease the distribution of the nonunion doors to the point of installation (I.R. p. 3, lines 7-8), is not excused by the aforementioned contract clause, whose coverage is limited to carpenters (Resp. Ex. 1).

10. To the findings of the Examiner that Respondents have not violated Section 8 (b) (4) (A) of the Act (I.R. p. 6, lines 44-45), to the recommendation of the Trial Examiner that the Complaint be dismissed (I.R. p. 7, lines 1-2), and to the failure of the Examiner to find a violation of Section 8 (b) (4) (A) and to recommend an appropriate order.

Dated at Los Angeles, California, this 28th day of January, 1955.

Respectfully submitted,

/s/ GEORGE H. O'BRIEN,
Counsel for the General Counsel

[Title of Board and Cause.]

RESPONDENTS' EXCEPTIONS TO INTERMEDIATE REPORT OF TRIAL EXAMINER

Come now Local 1976, United Brotherhood of Carpenters and Joiners of America, A. F. of L., Nathan Fleisher, and Los Angeles District Council of Carpenters, respondents herein, and separately and severally except to the findings of fact and conclusions of law of the Trial Examiner made and entered in his Intermediate Report and Recommended Order in the above entitled matter, as follows:

I.

Respondents, and each of them, separately and severally except to findings of fact and conclusions of the trial examiner as set forth in his Intermediate Report and Recommended Order, aforesaid, beginning with the word "Said" on page 2, line 17 thereof, and ending with the word "Paine" on page 2, line 19 thereof, for the reason that said findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the applicable law.

II.

Respondents, and each of them, separately and severally except to findings of fact and conclusions of the trial examiner as set forth in his Intermediate Report and Recommended Order, aforesaid, beginning with the word "In" on page 2, line 19 thereof,

and ending with the word $185,696.84" on page 2, line 20 thereof, for the reason that said findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the applicable law.

III.

Respondents, and each of them, separately and severally except to findings of fact and conclusions of the trial examiner as set forth in his Intermediate Report and Recommended Order, aforesaid, beginning with the word "From" on page 2, line 20 thereof, and ending with the word "$103,503.05" on page 2, line 22 thereof, for the reason that said findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the applicable law.

IV.

Respondents, and each of them, separately and severally except to findings of fact and conclusions of the trial examiner as set forth in his Intermediate Report and Recommended Order, aforesaid, beginning with the word "All" on page 2, line 22 thereof, and ending with the word "Wisconsin" on page 2, line 23 thereof, for the reason that said findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the applicable law.

V.

Respondents, and each of them, separately and severally except to findings of fact and conclusions

of the trial examiner as set forth in his Intermediate Report and Recommended Order, aforesaid, beginning with the word "In" on page 2, line 23, thereof, and ending with the word "$9,000.00" on page 2, line 24 thereof, for the reason that said findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the applicable law.

VI.

Respondents, and each of them, separately and severally except to findings of fact and conclusions of the trial examiner as set forth in his Intermediate Report and Recommended Order, aforesaid, beginning with the word "These" on page 2, line 25 thereof, and ending with the word "warehouse" on page 2, line 26 thereof, for the reason that said findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the applicable law.

VII.

Respondents, and each of them, separately and severally except to findings of fact and conclusions of the trial examiner as set forth in his Intermediate Report and Recommended Order, aforesaid, beginning with the word "In" on page 2, line 31 thereof, and ending with the word "Dreps" on page 2, line 33 thereof, for the reason that said findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the applicable law.

VIII.

Respondents, and each of them, separately and severally except to findings of fact and conclusions of the trial examiner as set forth in his Intermediate Report and Recommended Order, aforesaid, beginning with the word "Altmans" on page 2, line 44 thereof, and ending with the word "$745,000" on page 2, line 46 thereof, for the reason that said findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the applicable law.

IX.

Respondents, and each of them, separately and severally except to findings of fact and conclusions of the trial examiner as set forth in his Intermediate Report and Recommended Order, aforesaid, beginning with the word "In" on page 2, line 48 thereof, and ending with the word "$4,500,000" on page 2, line 50 thereof, for the reason that said findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the applicable law.

X.

Respondents, and each of them, separately and severally except to findings of fact and conclusions of the trial examiner as set forth in his Intermediate Report and Recommended Order, aforesaid, beginning with the word "The" on page 2, line 60 thereof, and ending with the word "dispute" on page 2, line 60 thereof, for the reason that said findings and

conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the applicable law.

XI.

Respondents, and each of them, separately and severally except to findings of fact and conclusions of the trial examiner as set forth in his Intermediate Report and Recommended Order, aforesaid, beginning with the word "In" on page 2, line 60 thereof, and ending with the word "arrival" on page 3, line 1 thereof, for the reason that said findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the applicable law.

XII.

Respondents, and each of them, separately and severally except to findings of fact and conclusions of the trial examiner as set forth in his Intermediate Report and Recommended Order, aforesaid, beginning with the word "The" on page 3, line 1 thereof, and ending with the word "floor" on page 3, line 3 thereof, for the reason that said findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the applicable law.

XIII.

Respondents, and each of them, separately and severally except to findings of fact and conclusions of the trial examiner as set forth in his Intermediate Report and Recommended Order, aforesaid, beginning with the word "to" on page 3, line 9 thereof,

and ending with the word "union-made" on page 3, line 9 thereof, for the reason that said findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the applicable law.

XIV.

Respondents, and each of them, separately and severally except to findings of fact and conclusions of the trial examiner as set forth in his Intermediate Report and Recommended Order, aforesaid, beginning with the word "learned" on page 3, line 12 thereof, and ending with the word "hung" on page 3, line 12 thereof, for the reason that said findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the applicable law.

XV.

Respondents, and each of them, separately and severally, except to findings of fact and conclusions of the trial examiner as set forth in his Intermediate Report and Recommended Order, aforesaid, beginning with the word "Fleisher" where the word appears for the second time on page 3, line 14 thereof, and ending with the word "non-union" on page 3, line 16 thereof, for the reason that said findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the applicable law.

XVI.

Respondents, and each of them, separately and

severally except to findings of fact and conclusions of the trial examiner as set forth in his Intermediate Report and Recommended Order, aforesaid, beginning with the word "the" on page 3, line 27 thereof, and ending with the word "product" on page 3, line 29 thereof, for the reason that said findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the applicable law.

XVII.

Respondents, and each of them, separately and severally except to findings of fact and conclusions of the trial examiner as set forth in his Intermediate Report and Recommended Order, aforesaid, beginning with the word "Barron" on page 3, line 29 thereof, and ending with the word "hung" on page 3, line 31 thereof, for the reason that said findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the applicable law.

XVIII.

Respondents, and each of them, separately and severally except to findings of fact and conclusions of the trial examiner as set forth in his Intermediate Report and Recommended Order, aforesaid, beginning with the word "who" on page 3, line 33 thereof, and ending with the word "connection" on page 3, line 34 thereof, for the reason that said findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the applicable law.

XIX.

Respondents, and each of them, separately and severally except to the findings of fact and conclusions of the trial examiner as set forth in his Intermediate Report and Recommended Order, aforesaid, beginning with the word "the" on page 3, line 54 thereof, and ending with the word "locals" on page 4, line 2 thereof, for the reason that said findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the applicable law.

XX.

Respondents, and each of them, separately and severally except to findings of fact and conclusions of the trial examiner as set forth in his Intermediate Report and Recommended Order, aforesaid, beginning with the word "for" on page 4, line 19 thereof, and ending with the word "1976" on page 4, line 23 thereof, for the reason that said findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the applicable law.

XXI.

Respondents, and each of them, separately and severally except to findings of fact and conclusions of the trial examiner as set forth in his Intermediate Report and Recommended Order, aforesaid, beginning with the word "If" on page 4, line 26 thereof, and ending with the word "necessary" on page 4, line 30 thereof, for the reason that said findings and conclusions are not supported by substantial evi-

dence on the record considered as a whole and are contrary to the applicable law.

XXII.

Respondents, and each of them, separately and severally except to findings of fact and conclusions of the trial examiner as set forth in his Intermediate Report and Recommended Order, aforesaid, beginning with the word "In" on page 4, line 32 thereof, and ending with the word "viewed" on page 4, line 34 thereof, for the reason that said findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the applicable law.

XXIII.

Respondents, and each of them, separately and severally except to findings of fact and conclusions of the trial examiner as set forth in his Intermediate Report and Recommended Order, aforesaid, beginning with the word "Here" on page 4, line 35 thereof, and ending with the word "affected" on page 4, line 36 thereof, for the reason that said findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the applicable law.

XXIV.

Respondents, and each of them, separately and severally except to findings of fact and conclusions of the trial examiner as set forth in his Intermediate Report and Recommended Order, aforesaid, begin-

ning with the word "the" on page 4, line 39 thereof, and ending with the word "union" on page 4, line 41 thereof, for the reason that said findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the applicable law.

XXV.

Respondents, and each of them, separately and severally except to findings of fact and conclusions of the trial examiner as set forth in his Intermediate Report and Recommended Order, aforesaid, beginning with the word "a" on page 4, line 41 thereof, and ending with the word "doors" on page 4, line 43 thereof; for the reason that said findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the applicable law.

XXVI.

Respondents, and each of them, separately and severally, except to findings of fact and conclusions of the trial examiner as set forth in his Intermediate Report and Recommended Order, aforesaid, beginning with the word "obviously" on page 4, line 43 thereof, and ending with the word "products" on page 4, line 45 thereof, for the reason that said findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the applicable law.

XXVII.

Respondents, and each of them, separately and severally except to findings of fact and conclusions

of the trial examiner as set forth in his Intermediate Report and Recommended Order, aforesaid, beginning with the word "If" on page 4, line 45, thereof, and ending with the word "cease" on page 4, line 49 thereof, for the reason that said findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the applicable law.

XXVIII.

Respondents, and each of them, separately and severally except to findings of fact and conclusions of the trial examiner as set forth in his Intermediate Report and Recommended Order, aforesaid, beginning with the word "I" on page 4, line 49 thereof, and ending with the word "merit" on page 4, line 51 thereof, for the reason that said findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the applicable law.

XXIX.

Respondents, and each of them, separately and severally except to findings of fact and conclusions of the trial examiner as set forth in his Intermediate Report and Recommended Order, aforesaid, beginning with the word "Respondents" on page 4, line 53 thereof, and ending with the word "hanging" on page 4, line 59 thereof, for the reason that said findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the applicable law.

XXX.

Respondents, and each of them, separately and severally except to findings of fact and conclusions of the trial examiner as set forth in his Intermediate Report and Recommended Order, aforesaid, beginning with the word "Finklestein" on page 4, line 59 thereof, and ending with the word "impression" on page 4, line 61 thereof, for the reason that said findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the applicable law.

XXXI.

Respondents, and each of them, separately and severally except to findings of fact and conclusions of the trial examiner as set forth in his Intermediate Report and Recommended Order, aforesaid, beginning with the word "But" on page 4, line 61 thereof, and ending with the word "doors" on page 4, line 63 thereof, for the reason that said findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the applicable law.

XXXII.

Respondents, and each of them, separately and severally except to findings of fact and conclusions of the trial examiner as set forth in his Intermediate Report and Recommended Order, aforesaid, beginning with the word "the" on page 4, line 64 thereof, and ending with the word "matters." on page 5, line 2 thereof, for the reason that said findings and conclusions are not supported by substantial evidence

on the record considered as a whole and are contrary to the applicable law.

XXXIII.

Respondents, and each of them, separately and severally except to findings of fact and conclusions of the trial examiner as set forth in his Intermediate Report and Recommended Order, aforesaid, beginning with the word "Further" on page 5, line 2 thereof, and ending with the word "material" on page 5, line 5 thereof, for the reason that said findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the applicable law.

XXXIV.

Respondents, and each of them, separately and severally except to findings of fact and conclusions of the trial examiner as set forth in his Intermediate Report and Recommended Order, aforesaid, beginning with the word "here" on page 5, line 17 thereof, and ending with the word "employees" on page 5, line 18 thereof, for the reason that said findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the applicable law.

XXXV.

Respondents, and each of them, separately and severally except to findings of fact and conclusions of the trial examiner as set forth in his Intermediate Report and Recommended Order, aforesaid, beginning with the word "The" on page 5, line 18 thereof,

where the word appears for the second time, and ending with the word "consent" on page 5, line 20, thereof, for the reason that said findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the applicable law.

XXXVI.

Respondents, and each of them, separately and severally except to findings of fact and conclusions of the trial examiner as set forth in his Intermediate Report and Recommended Order, aforesaid, beginning with the word "It" on page 5, line 20 thereof, and ending with the word "8 b (4) (A)" on page 5, line 24 thereof, for the reason that said findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the applicable law.

XXXVII.

Respondents, and each of them, separately and severally except to findings of fact and conclusions of the trial examiner as set forth in his Intermediate Report and Recommended Order, aforesaid, beginning with the word "Even" on page 5, line 24 thereof, and ending with the word "Jensen" on page 5, line 27 thereof, for the reason that said findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the applicable law.

XXXVIII.

Respondents, and each of them, separately and severally except to findings of fact and conclusions

of the trial examiner as set forth in his Intermediate Report and Recommended Order, aforesaid, beginning with the word "Because" on page 5, line 29 thereof, and ending with the word "doors" on page 5, line 34 thereof, for the reason that said findings and conclusion are not supported by substantial evidence on the record considered as a whole and are contrary to the applicable law.

XXXIX.

Respondents, and each of them, separately and severally except to findings of fact and conclusions of the trial examiner as set forth in his Intermediate Report and Recommended Order, aforesaid, beginning with the word "it" on page 6, line 1 thereof, and ending with the word "reconsider" on page 6, line 11 thereof, for the reason that said findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the applicable law.

XL.

Respondents, and each of them, separately and severally except to findings of fact and conclusions of the trial examiner as set forth in his Intermediate Report and Recommended Order, aforesaid, beginning with the word "I" on page 6, line 35 thereof, and ending with the word "Paine" on page 6, line 40 thereof, for the reason that said findings and conclusions are not supported by substantial evidence on the record considered as a whole and are contrary to the applicable law.

Respectfully submitted,

ARTHUR GARRETT and
JAMES M. NICOSON
/s/ ARTHUR GARRETT
/s/ JAMES M. NICOSON
Attorneys for Respondents

United States of America
Before the National Labor Relations Board
Case No. 21-CC-189

LOCAL 1976, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL, its agent, NATHAN FLEISHER, AND LOS ANGELES COUNTY DISTRICT COUNCIL OF CARPENTERS[1]

and

SAND DOOR AND PLYWOOD CO.

DECISION AND ORDER

On December 13, 1954, Trial Examiner Wallace E. Royster issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had not engaged in and were not engaging in

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[1] The name of the District Council appears as amended at the hearing.

the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, exceptions and briefs were filed by the General Counsel, the charging party, and the Respondents, and a brief amicus was filed by the Chamber of Commerce of the United States. Pursuant to notice, oral argument was held on July 7, 1955, before the Board at Washington, D. C., in which the General Counsel, the charging party, and the Respondents participated.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, the oral argument, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner only insofar as they are consistent with this Decision and Order.

1. The Respondents except to the Trial Examiner's recommendation that jurisdiction should be asserted herein. The complaint alleges that the Respondents induced and encouraged employees of Harstad and Jensen and of other employers to engage in concerted refusals to install nonunion doors manufactured by Paine Lumber Company,[2] and supplied by Sand Door and Plywood Co.,[3] the charging

[2] Hereinafter referred to as Paine.

[3] Hereinafter referred to as Sand.

party, to Havstad and Jensen,[4] with an object of forcing or requiring Havstad and Jensen, Watson and Dreps, and other employers to cease using or otherwise dealing in the products of Paine and Sand and to cease doing business with Paine and Sand, thereby violating Section 8 (b) (4) (A) of the Act.

In the Jamestown Builders Exchange case,[5] the Board set forth the rule which it has since followed[6] for determining whether to assert jurisdiction in cases involving alleged secondary boycotts in violation of Section 8 (b) (4) (A). This rule provides that if the operations of the primary employer alone satisfy the Board's jurisdictional standards, jurisdiction is to be asserted without further inquiry. Otherwise, operations of secondary employers are also to be considered to the extent that they are affected by the alleged unlawful conduct.[7]

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[4] The doors in question were shipped by Paine from its Wisconsin plant directly to Sand, the exclusive distributor of Paine doors in Southern California, and were sold by Sand to Watson & Dreps, a building materials retailer, which, in turn, sold the doors to Havstad and Jensen, who were engaged in building a hospital as joint venturers.

[5] Truck Drivers Local Union No. 649, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL (Jamestown Builders Exchange, Inc.), 93 NLRB 386.

[6] See International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 554, et al (McAllister Transfer, Inc.), 110 NLRB 1769, hereinafter referred to as McAllister Transfer, Inc.

[7] As to the interpretation of this rule as it applies to operations of secondary employers, see McAllister Transfer, Inc., supra.

We agree with the General Counsel that the Trial Examiner erroneously designated Havstad and Jensen as the primary employer in this case in considering whether jurisdiction was to be asserted. As hereinafter found, Havstad and Jensen was a neutral employer whose employees were unlawfully induced or encouraged to refuse to install the doors in question. As such, Havstad and Jensen is a secondary employer within the meaning which we customarily attach to that term. Furthermore, we agree with the General Counsel that Paine is a primary employer within the meaning of the Jamestown jurisdictional rule. Thus, the violation found herein is similar to that involved in the Sound Shingle Co.[8] case. As in that case, the Respondents seek, by proscribed means, to force or require an employer to stop handling the nonunion product of another manufacturer although no active dispute exists between the nonunion manufacturer and the Respondents. The Board there held that such conduct "constitutes a secondary boycott of the type which Section 8 (b) (4) (A) was intended to proscribe." Implicit in that finding was the further finding that the manufacturer of the nonunion product was in the position of a primary employer. And although there was an active primary dispute with the primary employer in the Jamestown case, we perceive no reason to re-

[8] Washington-Oregon Shingle Weavers' District Council et al (Sound Shingle Co.), 101 NLRB 1159, Member Murdock dissenting. Enforced, 211 F. 2d 946 (C. A. 9, 1954). Hereinafter referred to as Sound Shingle Co.

strict the use of the term primary employer as used in that case to employers with whom the union involved has an active primary dispute. Accordingly, we find that Paine's annual direct outflow of materials from Wisconsin, being in excess of $100,000, is sufficient to warrant the assertion of jurisdiction in this case.[9]

2. The Respondents contend that, on the record in this case, the Board should find that the Respondents did not induce or encourage employees of Havstad and Jensen to engage in a strike or concerted refusal to install the Paine doors, and that the Trial Examiner's contrary findings should be reversed. On the other hand, the General Counsel and the charging party each contend that the record discloses incidents of inducement or encouragement in addition to those found by the Trial Examiner. In particular, the General Counsel contends that Foreman Steinert's instructions to carpenter Agronovich and several laborers, hereinafter referred to, constitute proscribed inducement and encouragement attributable to the Respondents. We find merit in this contention.

As the Trial Examiner found, on the morning of August 17, 1954, Fleisher, the Respondent Local's business agent, approached Steinert, Havstad and Jensen's foreman, at the building site, and told Steinert to stop hanging the Paine doors until it

[9] Jonesboro Grain Drying Cooperative, 110 NLRB 481. It is therefore unnecessary to consider other arguments advanced by the General Counsel for asserting jurisdiction in this case.

could be determined whether they were union or nonunion. Steinert told several laborers, who were under his supervision and then engaged in distributing the doors to the locations where they were to be hung, to stop distributing the doors. Then, accompanied by Fleisher, Steinert went to the location where carpenter Agronovich was preparing to hang doors and told him to stop hanging the doors because they were not union-made. Steinert was a member of a constituent local of the Respondent District Council. Under its By-Laws and Trade Rules, Steinert was vested with the authority and responsibility to enforce the District Council's By-Laws and Trade Rules.[10] Among the rules was one barring union members from handling nonunion materials.[11]

It is true that as a foreman as well as union agent, Steinert's status at first glance appears equivocal. However, it is clear that Fleisher, who, as the Trial Examiner found, was an agent of both the Respondent District Council and the Respondent Local, approached Steinert not as a representative of manage-

[10] Section 20 (f) of the By-Laws and Trade Rules provides: All foremen are to be held equally responsible (the same as the Steward) for the enforcement of all By-Laws and Trade Rules of the District Council. Violators of this paragraph shall be subject to a fine of $100.00 and/or expulsion.

[11] Section 16 (d) of the By-Laws and Trade Rules provides in part: No member shall use, handle, install or erect any material produced or manufactured from wood that is not produced and manufactured by members of the United Brotherhood of Carpenters and Joiners of America.

ment but as an instrumentality of the Respondents through whom the by-laws could be enforced. Thus, Fleisher did not ask Steinert to stop the door hanging, but, in Steinert's words, Fleisher "told me that we'd have to quit hanging the doors." (emphasis added). Also, when, shortly thereafter, Superintendent Nicholson asked Fleisher why he stopped the men from hanging the doors, as credibly testified to by Nicholson, Fleisher replied that "he had orders from the District Council that morning to stop them from hanging the doors," that he "could have pulled them off yesterday but * * * waited until today." Significantly too, after giving his instructions to Steinert, Fleisher stood by to insure that Steinert passed these instructions on to employees. Furthermore, Fleisher did not approach Steinert to gain enforcement of their contract which the Respondents claim relieved the carpenters of the duty of installing the Paine doors, for at no time in his conversations with Steinert or Nicholson was the contract mentioned by Fleisher. We note in this connection that Steinert, as a foreman, was at the lowest level of management and not an official who would normally be approached as to matters of company policy and contract compliance. As there is, in addition, no indication of the extent of Steinert's authority to act for his employer, we conclude that Fleisher approached Steinert in Steinert's capacity as agent of the Respondent District Council and that Steinert acted in such capacity in ordering the laborers and carpenter Agronovich to stop handling the doors, thereby inducing or encouraging them to engage in a

concerted refusal to handle the Paine doors.[12] We further conclude that Steinert's conduct is attributable to the Respondent Local because Steinert acted pursuant to the orders of Fleisher, who was the business agent of the Respondent Local.

3. We find no merit in the Respondents' contention that, even assuming that there was inducement and encouragement of a concerted refusal to hang the doors, it was not for an object proscribed by the Act. In effect, the Respondents contend that their activity was primary because its only objective was to require Havstad and Jensen to use union-made materials in accordance with their contract, hereinafter referred to, and because the Respondents had no active labor dispute with Paine. As indicated above, we regard our decision in Sound Shingle Co.,[13] as dispositive of this issue. Here, as there, a direct object of such inducement was to force or require the secondary employer to cease using or handling the product of the primary employer, another manufacturer. We held that such a product boycott is proscribed by the Act, even in the absence of an active dispute over specific demands with the manufacturer of a nonunion product. As it is clear, under Board precedents, that, in order to find a violation of Section 8 (b) (4) (A), the object proscribed by the Act need not be the sole object of the conduct

[12] In view of this finding, we need not determine whether there was any other incident constituting such inducement or encouragement.

[13] Supra.

under scrutiny,[11] we conclude that the proscribed object necessary to a finding of a violation exists in this case.

Moreover, we are of the opinion that the record establishes the existence of another object of the Respondents' conduct which falls within the interdiction of Section 8 (b) (4) (A). Thus, when Barron of Sand Door called Thomas, the secretary-treasurer of the District Council, for information about the District Council's position with respect to the Paine doors, Thomas stated that clearance might be obtained for the doors purchased by Havstad and Jensen, as well as Sand Door's floor stock and special orders, if Sand's stock orders were cancelled and no further orders were placed with Paine. From this conversation, it is clear that a further objective of the Respondents' conduct was to force or require Sand Door to cease doing business with Paine. Under Section 8 (b) (4) (A), "forcing or requiring * * * any employer or other person * * * to cease doing business with any other person" (emphasis added) is proscribed when means made unlawful by that Section are employed. Thus, it is not necessary that the employer or person whom the labor organization seeks to force to cease doing business with another person be the employer of the employees who have been induced or encouraged to engage in a

[11] Los Angeles Building and Construction Trades Council, AFL, (Standard Oil Co.), 105 NLRB 868 at 870, and cases cited therein; Wood, Wire and Metal Lathers International Union, Local No. 234, AFL (Acousti Engineering Company), 97 NLRB 574.

work stoppage for that purpose. Accordingly, we find that an additional object of the Respondents' conduct, proscribed by the Act, was to force or require Sand to cease doing business with Paine.

4. The final issue which remains to be considered in this case is whether the Respondents' contract with Havstad and Jensen which provides, "Workmen shall not be required to handle nonunion material," removes the above-described conduct from the proscription of Section 8 (b) (4) (A) under the so-called Conway doctrine. In the Conway Express case,[15] shop stewards, at three establishments of secondary employers, upon advice from the respondent union in that case that a strike was "on", ceased handling freight of a struck primary employer. Each of the three secondary employers acquiesced in its employees' refusal to handle the "struck" goods. In addition, each of these 3 employers was a party to an agreement which reserved to the union the right to refuse to handle such goods. As the secondary employers had, in effect, consented in advance to boycott the "struck" employer, a majority of the Board concluded that the failure of their employees to handle the struck goods "was not in the literal sense a 'strike' or 'refusal' to work, nor was any such concerted insubordination contemplated by the Respondent when it caused the employees to exercise

[15] International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 294, AF of L (Henry V. Rabouin, d/b/a Conway's Express), 87 NLRB 972, at 981-983, affirmed 195 F. 2d 906, (C.A. 2, 1952).

their contractual privilege." The Board rejected a contention that the contract clause relied on was repugnant to the policy of the Act and therefore invalid.

Subsequently, the problem of the effect of a substantially similar "hot cargo" clause arose in the Pittsburgh Plate Glass case.[16] In that case, again, the secondary employers affirmed their "hot cargo" contracts by acquiescing in their enforcement. The Board found no violation of Section 8 (b) (4) (A), relying on its Conway Express decision, and adding as a further ground that the refusal to handle "struck" freight was not "in the course of * * * employment," within the meaning of Section 8 (b) (4) (A), as the "hot cargo" clause in the contract excluded from required job duties work on such goods.

As in McAllister Transfer, Inc.,[17] and Reilly Cartage Company,[18] the validity of these decisions is now challenged by the General Counsel, the Trial Examiner in the instant case having felt bound to follow them.

It is well settled that, where an employer, at the request of a union which refrains from the use of threats or direct appeals to his employees, voluntarily agrees to boycott the goods of another employer, there is no violation of Section 8 (b) (4) (A) be-

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[16] Chauffeurs, Teamsters, Warehousemen and Helpers Local Union No. 135 (Pittsburgh Plate Glass Company), 105 NLRB 740 at 743-745.

[17] McAllister Transfer, Inc., supra.

[18] Marie T. Reilly d/b/a Reilly Cartage Company, 110 NLRB 1742.

cause there has been neither a strike nor inducement or encouragement of employees to engage in such conduct.[19] What an employer may be induced to agree to do at the time the boycott is requested, he may be induced to agree in advance to do by executing a contract containing a "hot cargo" clause. Insofar as such contracts govern the relations of the parties thereto with each other, we do not regard it our province to declare them contrary to public policy. However, we do not agree that unions, which are parties to such contracts, may approach employees of the contracting employer and induce or encourage them to refuse to handle the goods of another employer with immunity from the sanctions of Section 8 (b) (4) (A). In our opinion, such conduct constitutes inducement or encouragement of employees to engage in a concerted refusal to handle goods for an object proscribed by Section 8 (b) (4) (A) no less than it does in the absence of such agreement.[20] Such

[19] Printing Specialties and Paper Converters Union, Local 388, AFL (Sealright Pacific, Ltd), 82 NLRB 271, 272 at fn. 4; Lewis Karlton d/b/a Consolidated Frame Company, 91 NLRB 1295 at 1299; Local Union 878, International Brotherhood of Teamsters, etc. (Arkansas Express, Inc.), 92 NLRB 265.

[20] This is essentially the view expressed by Chairman Farmer in his concurring opinion in the McAllister case, in which he said that if a contrary view were adopted" * * * the Board would place itself in the posture of championing boycott clauses and affirmatively enforcing them as between the parties. This is the inevitable result of giving the agreement crucial weight in evaluating the conduct of the parties, and refusing to find a violation solely be-

conduct is contrary to the express language of the Statute, and therefore cannot be validated by the existence of a contract containing a "hot cargo" clause. In enacting Section 8 (b) (4) (A), Congress intended to protect the public from strikes or concerted refusals interrupting the flow of commerce at points removed from primary labor-management disputes.[21]

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cause of the contract's existence in the face of other evidence which, * * * clearly shows that all the essential statutory elements of an unlawful boycott are nevertheless present."

[21] The preamble of the Act, Section 1 (b), makes it clear that: * * * employers, employees, and labor organizations [should] * * * above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce * * * to proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce. (emphasis added)

With specific reference to Section 8 (b) (4) (A) the following excerpts appear in the legislative history.

Senate Report No. 105 on S. 1126, p. 8 (1 Leg. Hist. 414) stated: Because of the nature of certain of these practices, especially jurisdictional disputes and secondary boycotts and strikes for specifically defined objectives, the committee is convinced that additional procedures must be made available under the National Labor Relations Act in order ade-

The Employer, but not the union, may instruct his employees to cease handling goods sought to be boycotted. Until the Employer instructs his employees that they need not handle the "unfair" product, a strike or concerted refusal to handle such goods constitutes "a strike or concerted refusal in the course of employment" to handle the goods within the meaning of Section 8 (b) (4) (A). In this connection, we disagree with the holding in the Pittsburgh Plate Glass case that the words, "* * * in the course of employment," found in Section 8 (b) (4) (A) have a restrictive meaning. We are persuaded that Congress used this phrase only to distinguish

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quately to protect the public welfare which is inextricably involved in labor disputes.

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Hence, we have provided that the Board, acting in the public interest and not in vindication of purely private rights, may seek injunctive relief in the case of all types of unfair labor practices and that it shall also seek such relief in the case of strikes and boycotts defined as unfair labor practices. (Emphasis added)

Senator Taft stated in debate (93 Cong. Rec. 4323, April 29, 1947): Take a case in which the employer is getting along perfectly with his employees. They agree on wages. Wages and working conditions are satisfactory to both sides. Someone else says to those employees, 'We want you to strike against your employer because he happens to be handling some product which we do not like. We do not think it is made under proper conditions.' Of course if that sort of thing is encouraged there will be hundreds and thou-

between employees in their capacity as employees and employees in their capacity as consumers.

We hold that, regardless of the existence of a "hot cargo" clause, any direct appeal to employees by a union to engage in a strike or concerted refusal to handle a product is proscribed by the Act when one of the objectives set forth in Section 8 (b) (4) (A) is present. Accordingly, having found that such conduct occurred, for a proscribed object, we con-

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sands of strikes in the United States. There is no reason that I can see why we should make it lawful for persons to incite workers to strike when they are perfectly satisfied with their conditions. If their conditions are not satisfactory, then it is perfectly lawful to encourage them to strike. The Senator [Pepper] says they must be encouraged to strike because their employer happens to be doing business with someone the union does not like or with whom it is having trouble or having a strike. On that basis there can be a chain reaction that will tie up the entire United States in a series of sympathetic strikes, if we choose to call them that. (Emphasis added)

Representative Landis stated (93 Cong. Rec. A 1296, March 24, 1947): Secondary boycotts engaged in by labor unions to force a third party, not a party to a primary labor dispute, to force that party to cease using the products of the employer engaged in the primary dispute is an activity which should be made illegal. Secondary boycotts have had the effect of throwing a great many innocent people out of work. As a result of these secondary boycotts many of our citizens have been deprived of the deliveries of milk, bread, meat, fruits, vegetables, and other essentials of life. (Emphasis added)

clude that the Respondents violated Section 8 (b) (4) (A).[22]

The effect of the unfair labor practices on commerce.

The activities of the Respondents, set forth above, occurring in connection with the operations of Paine Lumber Company, Sand Door and Plywood Co., and other employers as described in the Intermediate Report attached hereto, have a close, intimate and substantial relation to trade, traffic and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

The Remedy

Having found that the Respondents violated Section 8 (b) (4) (A) of the Act, as set forth above, we shall order them to cease and desist from such conduct. We shall also order that the Respondents take certain affirmative action designed to effectuate the policies of the Act.

Conclusions of Law

1. Local 1976, United Brotherhood of Carpenters and Joiners of America, AFL, and Los Angeles County District Council of Carpenters are labor or-

[22] To the extent that the Board's decisions in Conway's Express, supra, and Pittsburgh Plate Glass Company, supra, are inconsistent with the majority holding in this case, they are overruled.

ganizations within the meaning of Section 2 (5) of the Act. Nathan Fleisher is business agent of Respondent Local 1976, and an agent of Respondent District Council within the meaning of the Act.

2. By inducing and encouraging employees of Havstad and Jensen to engage in a strike or concerted refusal in the course of their employment to handle or install doors manufactured by Paine Lumber Company, an object thereof being to force and require Havstad and Jensen to cease using, handling or otherwise dealing in the products of Paine Lumber Company and to force or require Sand Door and Plywood Company to cease doing business with Paine Lumber Company, the Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (b) (4) (A) of the Act.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

Order

Upon the entire record in this case and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, Local 1976, United Brotherhood of Carpenters and Joiners of America, AFL, and Los Angeles County District Council of Carpenters, and their officers, representatives, successors, assigns, and agents, including Respondent Nathan Fleisher, shall:

1. Cease and desist from inducing or encouraging

the employees of Havstad and Jensen, or any other employer, to engage in a strike or concerted refusal in the course of their employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services for their employer, where an object thereof is to force or require Havstad and Jensen or any other employer or person to cease using, handling, or otherwise dealing in the products of Paine Lumber Company or any other nonunion manufacturer, or to force or require Said Door and Plywood Co., or any other employer or person, to cease doing business with Paine Lumber Company or any other nonunion manufacturer.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Post at their Los Angeles, California, business offices, respectively, copies of the notice attached hereto as Appendix A.[2] Copies of said notice, to be furnished by the Regional Director for the Twenty-First Region, shall, after being duly signed by the official representatives of the Respondents, including Nathan Fleisher, be posted by the Respondents Local 1976 and District Council, immediately upon receipt thereof, and maintained by them for a period of sixty (60) consecutive days thereafter; in

[2] In the event this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted before the words, "A Decision and Order," the words, "A Decree of the United States Court of Appeals Enforcing."

conspicuous places including all places where notices to members of said labor organizations are customarily posted.

Reasonable steps shall be taken by said Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for the Twenty-First Region in writing, within ten (10) days from the date of this Order, what steps the Respondents have taken to comply herewith.

Dated, August 26, 1955, Washington, D. C.

[Seal] GUY FARMER, Chairman

BOYD LEEDOM, Member

National Labor Relations Board

Philip Ray Rodgers, Member, concurring:

I am concurring in the result reached herein by Chairman Farmer and Member Leedom only because I am convinced that "hot cargo" clauses are contrary to public policy and cannot therefore serve as a defense to a complaint charging a violation of Section 8 (b) (4) (A) of the Act.

In my joint opinion with Member Beeson in McAllister Transfer Inc., supra, I stated that a careful reading of the legislative history and an analysis of the established principles of law lead to the inevitable conclusion that Section 8 (b) (4) (A) of the Act was specifically intended to protect the public interest. More specifically, as stated in Senate Report No.

105 on S. 1126,[24] the provisions with which we are concerned here were adopted "in order adequately to protect the public welfare which is inextricably involved in labor disputes." I pointed out that it is a necessary concomitant of the protection of the public welfare that protection is also extended to employers and employees as well, but that such protection to private interests was in no way intended to detract from "the public interest that constitutes the very foundation of the policies implicit in these statutory enactments." In adopting these provisions of the Act, Congress clearly adopted a public policy against all secondary boycotts, without distinction as to type or kind. To hold otherwise is to substitute confusion for clarity and to create ambiguities in the face of a clear Congressional intent. To quote from our McAllister opinion:

No amount of ingenuity, it seems to us, can change the simple fact that a "hot cargo" contract is nothing more than a device to immunize in advance the very conduct which Congress in response to a dire public need sought effectively to eliminate. To permit a form of legal sophistry to make possible so flagrant a subterfuge for continuing this well-known abuse in labor disputes is to make a mockery of one of the most significant provisions which Congress wrote into the Act.

In my view of the facts of the instant case, the "hot cargo" contract, as a subterfuge for avoiding the proscriptions of the Act and as an effort at ad-

[24] Senate Report No. 105, p. 8 (1 Leg. Hist. 414).

vance immunization against unfair labor practice findings, is patently unenforceable. It follows therefore as a matter of law that this is not the type of agreement that can justify the conduct engaged in here. It is for this reason that while I concur in the result reached here I cannot join in the majority's rationale.

Dated, August 26, 1955, Washington, D. C.

PHILIP RAY RODGERS, Member
National Labor Relations Board

Ivar H. Peterson, Member, dissenting:

I do not agree with the majority of my colleagues that the Board is warranted in asserting jurisdiction here.

The facts with respect to this issue are substantially undisputed. Haystad and Jensen are joint venturers engaged in the State of California in the construction of a hospital building on the campus of the College of Medical Evangelists for the Seventh Day Adventists. This project commenced on July 1, 1952, and was still in progress at the time of the hearing. The nonunion doors were purchased by Haystad and Jensen from Watson and Dreps, millwork contractors in Los Angeles, and were valued at approximately $9,000. Watson and Dreps purchased the doors from Sand Door and Plywood Co., the charging party, which is also located in and around Los Angeles and is engaged in the wholesale jobbing of doors, plywood, and related building materials.

Watson and Dreps took delivery of the doors at the Sand Door warehouse. The latter, in turn, had purchased the doors from Paine Lumber Company at Oshkosh, Wisconsin, which shipped them directly to Sand Door from Wisconsin. On the present record, the only one of the above-named firms, whose business is sufficiently large so as to afford any possible justification for assertion of jurisdiction, is Paine—the Wisconsin manufacturer of the nonunion doors. In reaching its decision to exercise jurisdiction here based upon Paine's operations the majority attempts to analogize the situation to that in the Sound Shingle Case.[25] I do not consider it necessary to quarrel with the characterization of Paine as the primary employer and Haystad and Jensen as the secondary employer. However, I can not accept the majority's further conclusion that merely because such designations are made, ipso facto, there is reason for asserting jurisdiction here. In so doing, the majority is completely disregarding what for me is a critical and determinative difference between the Sound Shingle case and the instant one. Thus, in that case the Canadian manufacturer dealt directly with Sound Shingle, the employer whose employees the union was causing to refuse to work on the particular nonunion products. In the present case, we have two intermediate purchasers of the nonunion doors between Paine and Haystad and Jensen.

I find nothing in either the Jamestown[26] or Sound Shingle cases to support the exercise of jurisdiction

[25] See footnote 8, supra.
[26] See footnote 5, supra.

where, as here, the original manufacturer is the only party whose commerce facts happen to come within the Board's standards and its relationship with the ultimate purchaser is so remote. If an analogy is to be drawn between the instant case and other Board decisions, I submit that it is strikingly similar to the Brooks Wood line of cases.[27] In the latter cases, the Board has consistently declined to exercise jurisdiction over a manufacturer of goods which sells them to a purchaser within the same State, which purchaser has the manufacturer ship them directly to still another purchaser within the State, even though the final purchaser does a substantial interstate business. The chain of sales of the nonunion doors is here the same as in the Brooks Wood type of case with the sole exception being that there it was the ultimate purchaser, while in the instant case it is the manufacturer, which does the substantial interstate business. The rationale for the Board's refusal to exercise jurisdiction in the Brooks Wood line of cases was that the particular manufacturer's business is not once, but "twice removed" from interstate commerce. This reasoning is equally applicable here. Although I have agreed with the Board's special treatment of the jurisdictional question in secondary boycott cases as expressed in its Jamestown decision, I consider it an unwarranted extension of the rule laid down in that case to exercise jurisdiction here, despite the fact that the labor dispute in-

[27] Brooks Wood Products, 107 NLRB 237; C. P. Evans Food Stores, Inc., 108 NLRB 1651; McDonald, McLaughlin & Deane, 110 NLRB 1340.

volving Havstad and Jensen is twice removed from the manufacturer whose interstate commerce might be affected thereby.

I think it should be noted that the majority opinion clearly implies that in a product boycott case jurisdiction will be taken regardless of the number of intervening purchasers. Thus, if the manufacturer of nonunion products happens to do a sufficiently large interstate business, even though the goods to literally a score of intermediate purchasers all of whom, including the ultimate buyer, operate completely intrastate enterprises, the Board will assert jurisdiction solely because the manufacturer is the employer with whom the union primarily has its dispute. I believe that, to say the least, it is unrealistic not to recognize that in such circumstances, and indeed in the instant case as well, the impact of the union's activities at the situs of the secondary employer upon the commerce of the primary employer is relatively insubstantial.

In view of the foregoing, it is my opinion that it will not effectuate the policies of the Act to assert jurisdiction here. Accordingly, I would dismiss the complaint on this ground. However, because of the importance of the principle involved, I have also considered the merits of the case and agree with the views expressed by Member Murdock in his dissenting opinion.

Dated, August 26, 1955, Washington, D. C.

IVAR H. PETERSON, Member,
National Labor Relations Board

Abe Murdock, Member, dissenting:

I concur in Member Peterson's opinion. It is apparent that the assertion of jurisdiction in this case results in a double standard of jurisdiction—a highly restrictive standard for 8 (a) cases and an almost limitless standard for cases involving violations of Section 8(b). However, as a majority of the Board is asserting jurisdiction, I have considered the case on the merits.

In this case the Respondent Union, representing employees of Havstad and Jensen, building contractors, had bargained for and secured by contract an agreement that the Company would not require workmen to handle nonunion material. In the course of constructing a Los Angeles hospital Havstad and Jensen purchased a number of nonunion doors from Watson & Dreps, retailers. The latter had purchased these doors from Sand Door & Plywood Company, wholesalers, which, in turn, had purchased them from the Paine Lumber Co., Ltd., of Oshkosh, Wisconsin. The record is perfectly clear that neither this Union nor any other Union was engaged in a dispute with any of these companies except Havstad and Jensen. That dispute related directly and solely to the Respondent Union's invocation of Havstad and Jensen's contractual commitment not to require employees to handle nonunion material. Despite the fact that the Union acted pursuant to this contract, which a majority of the Board finds to be legal and not opposed to public policy, and despite the fact that the Union was careful to call only to the attention of Havstad and Jensen's foreman the fact that

the doors in question were nonunion, three members of the Board conclude that the Union has engaged in a secondary boycott within the meaning of Section 8 (b) (4) (A). I believe that the several bases of the majority's decision are untenable.

The three members of the majority are, it appears, in disagreement as to the effect of a provision in a collective bargaining contract whereby the employer agrees that its employees will not be required to handle nonunion material. Member Rodgers adheres to his position in McAllister Transfer, Inc.,[28] in which he and former Member Beeson held that such contracts were opposed to public policy and were therefore unenforceable. I believe that Member Peterson's and my dissenting opinion in that case is a complete and adequate answer to this view. Chairman Farmer and Member Leedom now contend in this case that such contracts, while not opposed to public policy and presumably enforceable in the courts, are nevertheless no defense to allegations that the contracting Union has induced employees, whom it represents, to engage in a strike or concerted refusal in the course of their employment to handle such nonunion products.

In his concurring opinion in McAllister Transfer, Inc., Chairman Farmer rejected the view of Member Rodgers and former Member Beeson to the effect that that a "hot cargo" clause was "at war with the secondary boycott provisions of Section 8 (b) (4)." In that case he asserted that such a view "glosses

[28] Supra.

over the plain language of the Statute which makes it an essential element of an unlawful boycott that the union 'engage in, or induce or encourage * * * employees * * * to engage in a strike or a concerted refusal' to handle the goods of another employer." He did not believe, he indicated, that a strike or a concerted refusal to work was induced where an employer voluntarily, either on an ad hoc basis or by means of a written contract provision, agreed to boycott another employer's products. He pointed out what seemed to him the fallacy in the argument that such contracts were opposed to public policy. Congress, he said, had not forbidden such voluntary acts of employers and it was for Congress, not the Board, to change the law "'if conduct of this character is thought to endanger the public welfare." In the instant case he joins Member Leedom in finding that the Union's inducement of employees, despite their employer's voluntary agreement not to require them to handle nonunion material, is "contrary to the express language of the Statute." The language of the Statute, it seems to me, cannot be expressly both ways. I believe Chairman Farmer was right the first time. In a footnote, however, Chairman Farmer and Member Leedom assert that their finding in this case, cited above, is essentially the same view expressed by Chairman Farmer in his concurrence in the McAllister case. If this is so, it is, indeed, a puzzling inconsistency because it would mean that Chairman Farmer had taken the position in that case that the plain language of the Statute both permitted and forbade the operation of a hot cargo

clause. I had thought the language taken from Chairman Farmer's McAllister concurrence, quoted in the above footnote, referred to a situation where, as there, the employer had repudiated his contract and directed his employees to handle hot cargo. This would seem to be supported by his subsequent distinction of the Conway case: "It is impossible to say here, as in Conway, that there was no unlawful 'inducement' or 'refusal' on the part of the employees to handle McAllister freight. This is so for the simple reason that the secondary employers here posted notices to their employees directing them to handle all freight without discrimination."

I am, moreover, at a loss to understand the new rationale which he and Member Leedom expound. First they agree that the inducement of employers to cease doing business with other employers is not unlawful under Section 8 (b) (4) (A). They then concede that what an employer may be induced to do he may be induced in advance to do by the execution of a contract freeing his employees from the duty of handling nonunion material during the term of the contract. Notwithstanding these findings, they thereupon take the position that the Union may not approach the employees it represents and for whose benefit the contract was made to notify them that their contract reserves to them the right not to handle nonunion material. Such notification, they find, induces these employees to engage in a strike, despite their employer's advance permission granting them the right to refrain from performing this work. These conclusions, in my opinion, cannot log-

ically stand together. A contract does not consist of words on a piece of paper. It is a binding agreement between the contracting parties that requires them to behave toward each other in a specific manner under a given set of circumstances, present or future. If they can legally agree, as Chairman Farmer and Member Leedom concede they can, that employees will not be required to handle nonunion material, I know of no authority that would define as a "strike" or a "refusal to work" the union's reliance upon this contractual permission. To find that employees are induced to engage in an act of insubordination against their employer solely on the ground that their own bargaining representative called to their attention the existence of a lawful provision in their lawful contract seems to me an untenable conclusion. It was, in my opinion, the duty of this Union to keep the employees it represented informed at all times of their rights under the contract, including the fact that handling nonunion material was not within the scope of their employment.

The decision of Chairman Farmer and Member Leedom encourages employers to violate their lawful agreements with labor organizations. Indeed, it tells them that they may freely take whatever the Union has given in collective bargaining to secure such an agreement without fear or ever having to pay the quid pro quo. It repudiates for an employer a voluntary agreement that he has never repudiated himself. It forbids a union, under penalty of the Board's injunctive processes, to assume that the employer meant what he said when he agreed in advance that

his employees would not have to handle nonunion material. Such a decision gravely and adversely affects the collective bargaining process, which it is the duty of this Board to promote and encourage. In this respect, it does not serve the general welfare and does not effectuate the intent of Congress to minimize strife and establish peaceful collective bargaining in the field of labor relations.

The majority further finds that the Union's object in this case was "to force or require" Havstad and Jensen to cease using or handling nonunion doors. But that Company had already agreed, as a majority of the Board finds, that it would not require its employees to handle such products. It was not, then, business agent Fleisher's remarks to foreman Steinert which "forced or required" the Company to instruct the carpenters to cease performing this work. The Company was required by its contract, which a majority of this Board finds to be lawful and not opposed to public policy, to free its employees from the duty of handling nonunion material. In this respect, at least, the instant case is entirely distinguishable from the Sound Shingle case,[29] upon which the majority relies. Here the dispute was directly and immediately related to a condition of employment of Havstad and Jensen's employees, a condition resolved through collective bargaining and reduced to writing. Under these circumstances, it seems clear to me that the dispute was primary in nature and that it was not "an object" of the Union to affect the

[29] Supra.

business relations between Havstad and Jensen and any other employer or person. As Judge Learned Hand has recently pointed out in a scholarly opinion,[30] there must be a distinction between the term "object" under Section 8 (b) (4) and a result that may flow from the Union's action. The liability imposed by this section, he held, "is much more limited than the usual liability for a tort, which extends to any damage that the tortfeasor should reasonably have expected to result from his act." If Congress had not imposed such a distinction, he pointed out, it would have made nearly all strikes unlawful. "Where, as in the instant case, a union's objective is clearly and unmistakably limited to a primary dispute, involving an employer's contractual obligation, the fact that this dispute may in some manner affect other employers with whom the union has no dispute at all does not mean that "an object" of the union is to reach these employers and engage in secondary conduct within the meaning of Section 8 (b) (4) (A). Senator Taft's statements on the floor of the Senate, quoted extensively in footnote 21 of the majority's decisions, seems to me to affirmatively support this conclusion. In his view Section 8 (b) (4) (A) made it unlawful to incite workers to strike "when they are perfectly satisfied with their conditions. If their conditions are not satisfactory, then it is perfectly lawful to encourage them to strike." (Emphasis added.) What could be more unsatisfac-

[30] Donds v. Longshoremen's Association, 36 LRRM 2329, 2332.

tory to a group of employees than the imminent violation by their employer of a condition of their employment, a condition secured through the processes of collective bargaining and incorporated in a contract?

Apart from the foregoing, it seems to me that the majority's conclusion that Havstad and Jensen's foreman, Steinert, was acting solely as an agent of the Union when he instructed several employees not to handle the nonunion doors is unsupportable. The majority bases its finding on the fact that Steinert was a member of the Union and, as such, had agreed to enforce the Union's by-laws and trade rules. It is, however, uncontroverted that Steinert was also the authorized agent of Havstad and Jensen to whom the employees looked for instructions in the performance of their duties. If Steinert was acting for the Union he was no less under the common law rules of agency acting on behalf of Havstad and Jensen, who had authorized him to represent the Company and speak for it in supervising the work of these employees. At most, therefore, any statements or actions of Steinert with regard to his work instructions to these employees must be construed as the joint action of both the Union and the Company. It is incomprehensible to me how the majority can conclude that employees, obediently following the instructions of their own foreman, are thereby being induced to engage in a strike or a concerted refusal to work for their employer. Indeed, I would suppose that the employees would be engaged in insubordination if they refused to follow Steinert's instruc-

tions. The fact that Havstad and Jensen permitted Steinert, its agent, to agree to enforce union rules seems to me to indicate nothing more than that the Company itself had consented to this procedure and made itself a party to such conduct by its foreman. To ignore Steinert's status as the Company's spokesman and to find, rather, that he represented only the Union and thus induced a strike of the employees he supervised, seems to me an unwarranted and unreasonable conclusion.

For these reasons I dissent.

Dated, August 26, 1955, Washington, D. C.

ABE MURDOCK, Member
National Labor Relations Board

APPENDIX A

Notice to All Members of Local 1976 and of Los Angeles County District Council of Carpenters, and Employees of Havstad and Jensen: Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our members that:

We will not induce or encourage the employees of Havstad and Jensen, or any other employer, to engage in a strike or concerted refusal in the course of their employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials, or commodities or to perform any

services for their employer where an object thereof is to force or require Havstad and Jensen or any other employer or person to cease using, handling, or otherwise dealing in the products of Paine Lumber Company or any other nonunion manufacturer, or to force or require Sand Door and Plywood Co. or any other employer or person to cease doing business with Paine Lumber Company or any other nonunion manufacturer.

Dated.....

Los Angeles County District
Council of Carpenters

By .....
(Representative) (Title)

Dated.....

Local 1976, United Brotherhood of Carpenters and Joiners of America, AFL

By .....
(Representative) (Title)

Dated.....

By .....
Nathan Fleisher, Business Representative

Affidavit of Service and Return Postal Receipts attached.

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

LOCAL 1976, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL, AND LOS ANGELES COUNTY DISTRICT COUNCIL OF CARPENTERS, AND NATHAN FLEISHER,
Respondents.

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.84, Rules and Regulations of the National Labor Relations Board—Series 6, as amended, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a proceeding had before said Board, entitled, "Local 1976, United Brotherhood of Carpenters and Joiners of America, AFL, its agent, Nathan Fleisher, and Los Angeles County District Council of Carpenters and Sand Door and Plywood Co.", Case No. 21-CC-189 before said Board, such transcript including the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

1. Stenographic transcript of testimony taken before Trial Examiner Wallace E. Royster on October 18, 19, 20 and 22, 1954, together with all exhibits introduced in evidence.

2. Copy of Trial Examiner Royster's Intermediate Report and Recommended Order (annexed to item 9 hereof) and copy of Order transferring case to the Board, both dated December 13, 1954, together with affidavit of service and United States Post Office return receipts thereof.

3. General Counsel's exceptions to the Intermediate Report received January 31, 1955.

4. Respondents' exceptions to the Intermediate Report received January 31, 1955.

5. Charging Party's exceptions to the Intermediate Report received January 31, 1955.

6. Copy of notice, dated May 31, 1955, of hearing to be held before the National Labor Rglations Board on July 7, 1955.

7. Letter from the Chamber of Commerce of the United States, dated June 15, 1955, requesting leave to file a brief amicus curiae.

8. Copy of Board's telegram to all parties, dated June 21, 1955, granting the request of the Chamber of Commerce of the United States to file brief amicus curiae.

9. Copy of Decision and Order issued by the National Labor Relations Board on August 26, 1955, with Intermediate Report and Recommended Order

annexed, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 9th day of March, 1956.

[Seal] /s/ FRANK M. KLEILER,
Executive Secretary, National
Labor Relations Board

[Endorsed]: No. 15026. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. Local 1976, United Brotherhood of Carpenters and Joiners of America, AFL, and Los Angeles County District Council of Carpenters and Nathan Fleisher, Respondents. Transcript of Record. Petition for Enforcement of Order of the National Labor Relations Board.

Filed March 14, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit

In the United States Court of Appeals
for the Ninth Circuit

No. 15026

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

LOCAL 1976, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL, AND LOS ANGELES COUNTY DISTRICT COUNCIL OF CARPENTERS, AND NATHAN FLEISHER,
Respondents.

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, et seq.), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondents, Local 1976, United Brotherhood of Carpenters and Joiners of America, AFL (hereinafter called Respondent Local 1976), and Los Angeles County District Council of Carpenters, (hereinafter called District Council), and their officers, representatives, successors, assigns, and agents, including Respond-

ent Nathan Fleisher. The proceeding resulting in said order is known upon the records of the Board as "Local 1976, United Brotherhood of Carpenters and Joiners of America, AFL, its agent, Nathan Fleisher, and Los Angeles County District Council of Carpenters and Sand Door and Plywood Co., Case No. 21-CC-189".

In support of this petition the Board respectfully shows:

(1) Respondents Local 1976 and District Council are labor organizations and Respondent Nathan Fleisher is the business agent of Local 1976 and an agent of the District Council. All said Respondents are engaged in promoting and protecting the interests of their members in the State of California, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on August 26, 1955, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondents Local 1976 and District Council, and their officers, representatives, successors, assigns, and agents, including Respondent Nathan Fleisher. On the same date, the Board's Decision and Order was served upon Respondents by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondents' counsel.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certi-

fying and filing with this Court a transcript of the entire record of the proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondents and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said Order of the Board, and requiring Respondents Local 1976 and District Council, and their officers, representatives, successors, assigns, and agents, including Respondent Nathan Fleisher, to comply therewith.

Dated at Washington, D. C., this 1st day of February, 1956.

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel, National Labor Relations Board

[Endorsed]: Filed Feb. 3, 1956. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

ANSWER TO PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Come now Local 1976, United Brotherhood of Carpenters and Joiners of America, AFL, Los Angeles County District Council of Carpenters and Nathan Fleisher, hereinafter referred to as respondents, and for answer to the petition of the National Labor Relations Board for enforcement of an Order of the National Labor Relations Board, admits, deny and allege as follows:

I.

Answering Paragraph 1 of the petitioners, respondents admit that Los Angeles County District Council of Carpenters and Local 1976, United Brotherhood of Carpenters and Joiners of America, AFL, are labor organizations. Respondents further admit that respondent Nathan Fleisher is the Business Agent of respondent Local 1976, but deny that the said Fleisher is the Business Agent of respondent District Council. Respondents admit they are engaged in promoting and protecting the interests of their respective members in California within the judicial circuit, but deny, generally and specifically, that respondents, or any of them, committed any unfair labor practices within this or any other judicial circuit or that respondents have committed any unfair labor practices of any nature.

Respondents deny that by virtue of Section 10

(e) of the National Labor Relations Act this Court has jurisdiction of these proceedings.

II.

Answering Paragraph 2 of the petition, respondents deny that due proceedings were had before the National Labor Relations Board. Respondents admit that on or about August 21, 1955 the National Labor Relations Board issued a purported findings of fact and conclusions of law and purported Order to respondents, but respondents deny that said purported findings of fact and conclusions of law and the purported Order were supported by substantial evidence and aver that the purported conclusions of law and purported Order were erroneous and are contrary to the law of the case. Respondents admit that the purported Decision and Order was served upon respondents.

III.

Answering Paragraph 3 of the petition, respondents aver that they are without information or knowledge on which to form a belief as to the allegations of said paragraph, and basing their answer on that ground deny each and every allegation therein contained.

IV.

Affirmatively, respondents allege:

1. That the National Labor Relations Board does not have jurisdiction over either of the respondents on the subject matter of the purported Decision and Order.

2. That respondents have not committed any unfair labor practices.

3. That the purported findings of fact, conclusions of law and Order are not supported by substantial evidence on the record considered as a whole.

4. That the purported findings of fact, conclusions of law and the purported Order are each and all contrary to law.

Wherefore, having fully answered to the petition, respondents, and each of them, pray that the petition be denied and that the Court enter an Order setting aside in full the purported Order of the National Labor Relations Board.

Dated at Los Angeles, California, this 18th day of February, 1956.

ARTHUR GARRETT and
JAMES M. NICOSON
/s/ By JAMES M. NICOSON,
Attorneys for Respondents

Affidavit of Service by Mail attached.

[Endorsed]: Filed Feb. 20, 1956. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH RESPONDENTS INTEND TO RELY

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

The Respondents, Local 1976, United Brotherhood of Carpenters and Joiners of America, AFL, Los Angeles County District Council of Carpenters, and Nathan Fleisher, in conformity with the rules of this Court hereby state the following points on which they intend to rely herein:

1. The National Labor Relations Board did not have jurisdiction over the respondents, Local 1976, United Brotherhood of Carpenters and Joiners of America, AFL, Los Angeles County District Council of Carpenters, and Nathan Fleisher.

2. That the proceedings before this Board were unconstitutional and void in that they deprive respondents, and each of them, of the rights guaranteed to them by the Fifth Amendment to the Constitution of the United States.

3. That the National Labor Relations Board's Findings of Fact and Conclusions of Law that respondents, and each of them, have committed unfair labor practices are not supported by substantial evidence in the record considered as a whole, and therefore are void and of no effect. That the National Labor Relations Board's Order issued herein is not supported by substantial evidence in the record con-

sidered as a whole, and therefore is void and of no effect.

4. That the National Labor Relations Board's Findings of Fact, Conclusions of Law and Order issued herein are contrary to law.

5. That the National Labor Relations Board's Findings of Fact and Conclusions of Law that respondents, and each of them, engaged in conduct in violation of Section 8 (b) (4) (A) of the National Labor Relations Act, as amended, are not supported by substantial evidence in the record considered as a whole, and are therefore void and of no effect.

Respectfully submitted,

ARTHUR GARRETT and
JAMES M. NICOSON
/s/ By JAMES M. NICOSON,
Attorneys for Respondents

[Endorsed]: Filed Feb. 20, 1956, Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH PETITIONER INTENDS TO RELY

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, the petitioner herein, pursuant to Rule 17 (6) of the rules

of this Court, files this statement of points upon which it intends to rely in the above entitled proceeding and this designation of parts of the record to be printed:

I.

Statement of Points

1. The Board properly asserted jurisdiction over respondents.

2. The Board properly found that respondents induced or encouraged employees to engage in a concerted refusal to install "non-union" doors in violation of Section 8 (b) (4) (A) of the National Labor Relations Act, as amended.

3. The Board's order is in all respects valid and proper.

4. A decree should be entered enforcing the Board's order in full.

* * * * *

Dated at Washington, D. C. this 9th day of March, 1956.

/s/ MARCEL MALLET-PREVOST
Assistant General Counsel National
Labor Relations Board

[Endorsed]: Filed March 12, 1956. Paul P. O'Brien, Clerk.

Before the National Labor Relations Board
Twenty-First Region

Case No. 21-CC-189

In the Matter of: LOCAL 1976, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL, its agent, NATHAN FLEISHER, AND DISTRICT COUNCIL OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA OF LOS ANGELES COUNTY and SAND DOOR AND PLYWOOD CO.

TRANSCRIPT OF PROCEEDINGS

Room 704, 111 West Seventh Street, Los Angeles, California. Monday, October, 1954.

Pursuant to notice, the above-entitled matter came on for hearing at 10:00 o'clock, a.m.

Before: Wallace E. Royster, Trial Examiner.

Appearances: George H. O'Brien, 111 West Seventh Street, Los Angeles, California, appearing on behalf of the General Counsel of the National Labor Relations Board. Arthur Garrett and James M. Nicoson, 2200 West Seventh Street, Los Angeles, California, appearing on behalf of the Respondent. Howard F. LeBaron, 111 West Seventh Street, Los Angeles, California, appearing on behalf of the Sand Door and Plywood Company. [1*]

* Page numbering appearing at top of page of original certified Reporter's Transcript.

Proceedings

Trial Examiner Royster: The hearing will be in order.

This is a formal hearing before the National Labor Relations Board in the matter of Local 1976, United Brotherhood of Carpenters and Joiners of America, AF of L, its agent, Nathan Fleisher, and District Council of the United Brotherhood of Carpenters and Joiners of America of Los Angeles County, upon a charge filed by Sand Door and Plywood Company in Case No. 21-CC-189.

My name is Wallace E. Royster, the Trial Examiner designated to hear the evidence and to make recommendations to the Board with respect to findings of fact and conclusions of law.

Will counsel please state their appearances for the record?

Mr. O'Brien: Appearing for the General Counsel of the National Labor Relations Board, George J. Bott, George H. O'Brien, address in care of National Labor Relations Board, Room 704, 111 West Seventh Street, Los Angeles, California.

Trial Examiner: All right, we will go right around the table, gentlemen.

Mr. LeBaron: Appearing for the Sand Door and Plywood Company, Howard F. LeBaron, 111 West Seventh Street, Room 1024, Los Angeles.

Mr. Nicoson: Appearing for the respondents, Arthur Garrett and James M. Nicoson, 2200 West Seventh Street, Los Angeles, California. [3]

* * * * *

Mr. O'Brien: Mr. Examiner, I shall ask the reporter to mark for identification the following documents:

As General Counsel's Exhibit 1-A, the Charge filed August 25, 1954.

As General Counsel's Exhibit 1-B, the Affidavit of Service by mail of the Initial Contract Letter, Copy of Charge.

As General Counsel's Exhibit 1-C, the Complaint issued September 24, 1954.

As General Counsel's Exhibit 1-D, the Notice of Hearing setting the hearing in the instant matter for this date, time and place.

As General Counsel's Exhibit 1-E, an Affidavit of Service of the foregoing documents.

And as General Counsel's Exhibit 1-F, the Answer of Respondent which was filed October 1, 1954. Now, I have not [4] checked to see whether it was filed during the time limit by the rules, but if it was late, General Counsel makes no objection and no point of it.

As General Counsel's Exhibit 1-G, an Amended Charge filed October 10, 1954.

As General Counsel's Exhibit 1-H, an Amendment to the Complaint, dated October 15, 1954.

And as General Counsel's Exhibit 1-I, an Affidavit of Service of the foregoing documents.

I will now offer General Counsel's Exhibits Nos. 1-A through 1-I in evidence.

* * * * *

Mr. Nicoson: We have no objection to the receipt of the exhibits. [5]

Trial Examiner: General Counsel's Exhibits 1-A through 1-I are received in evidence.

(Thereupon the documents above referred to were marked as General Counsel's Exhibits Nos. 1-A to 1-I and were received in evidence.)

Mr. Nicoson: I would like to move at this time to amend the Answer to further deny the Amendment.

Trial Examiner: Very well. Is that agreeable to counsel?

Mr. O'Brien: Certainly.

Trial Examiner: The Answer is so amended.

Mr. O'Brien: I would like to call Mrs. Kaiser.

BONNIE LOU KAISER

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. O'Brien): Will you please state your full name?

A. Bonnie Lou Kaiser.

Q. And were you recently married?

A. Yes, I was.

Q. And what was your former name, Mrs. Kaiser? A. Bonnie Lou Sweitz.

Q. And by whom are you employed?

A. I was employed by Havstad and Jensen.

Q. Up until when, ma'am?

A. A week ago today. [6]

(Testimony of Bonnie Lou Kaiser.)

Q. Were you employed by Haystad and Jensen on August 17, 1954? A. I was.

Q. What was your job at that time?

A. Secretarial and office work.

Q. And on August 17 were you in the office of Haystad and Jensen or on some building project of theirs? A. I was in the office.

Q. Where was the office?

A. 1721 New Jersey Street.

Q. On that day, August 17, 1954, did you have a conversation with a Mr. Nathan Fleisher?

A. I did.

Q. About what time of day, if you recall?

A. It was in the forenoon.

Q. Do you have any recollection of about what time it was?

A. Well, it was between around 10 or 11 o'clock I would say, between 10 or 11.

Q. Was anyone present besides and Mr. Fleisher?

A. Yes.

Q. Who?

A. Mr. Bob Arnett—I guess you'd say Robert Arnett.

Q. And who is Mr. Arnett?

A. He is from the R. W. Downer Company, salesman. [7]

* * * * *

Q. (By Mr. O'Brien): Did Mr. Arnett take part in your conversation with Mr. Fleisher?

A. I don't recall.

(Testimony of Bonnie Lou Kaiser.)

Q. What did you say to Mr. Fleisher and what did he say to you?

Mr. Nicoson: Objected to on the grounds that no proper foundation has been laid.

Mr. O'Brien: Mr. Fleisher is named as the respondent, it is admitted in the Answer that he is a business agent of the respondent local.

Trial Examiner: I will overrule the objection; you may answer.

The Witness: When he came into the office, I asked him what was the deal on the doors, why couldn't we hang them.

Mr. Nicoson: I cannot hear the witness.

Trial Examiner: Will you please try to keep your voice up so all the people present may hear you.

The Witness: Well, when I asked him that as to why we couldn't hang the doors, he said: "They are non-union, they do not have a label and no union man can touch those doors." And I said: "Why is it you have had this information for six months and you didn't notify us or let us know." And he said he took it up with the District Council and they said to let it go at the time. And then he said: "Well, I could have told you [8] yesterday, but I didn't." And I said that that still is not notice, you didn't tell us so how did we know. And then he said: "Well, I waited around here for three hours here to tell you." And I said that was still not giving notice because we were ready to hang the doors then. And then he says, "They are not union, no union man can touch those doors."

(Testimony of Bonnie Lou Kaiser.)

Q. Do you recall any more of the conversation with him?

A. No, we discussed it back and forth, you know, but that was the main thing, he said that they were not union label and that no union man could touch the doors.

Q. And is that just about everything that you remember about that conversation with Mr. Fleisher?

A. Well, I can't remember much more than that; that was just about the main discussion on it.

Q. On that occasion was a telephone call made by you or was a telephone call received?

A. Yes, I was talking——

Mr. Nicoson: Just a moment.

Trial Examiner: You have answered the question.

Q. (By Mr. O'Brien): Did you make the telephone call or did someone call you?

A. Well, at the time that Mr. Fleisher was in the office someone called me.

Q. And from whom did you receive that telephone call? A. Mr. Baron of Sand Door. [9]

Q. Now, after speaking to Mr. Baron, did you hand the telephone to Mr. Fleisher? A. I did.

Q. And did you hear what Mr. Fleisher said on the telephone to Mr. Baron? A. Yes, I did.

Q. What did Mr. Fleisher say on the telephone to Mr. Baron?

A. He said that the District Council told me the doors didn't have a label on them and that no union

(Testimony of Bonnie Lou Kaiser.)

man could touch those doors as long as they didn't have a label.

Q. On any other occasion, did you have any conversation with Mr. Fleisher about these doors?

A. Well, well, six months prior to that when he said where are you getting——

Mr. Nicoson: Just a minute. Your Honor, please, I took the question to be a foundation question.

Trial Examiner: I will let the answer remain as yes and strike the remainder.

* * * * *

Q. (By Mr. O'Brien): And where did that conversation take [10] place? A. In the office.

Q. In the same office that you referred to before, Havstad and Jensen? A. That is correct.

Q. Do you recall whether anyone else was present besides you and Mr. Fleisher?

A. I don't recall if there was anyone else there.

Q. And what was that conversation?

A. It was when he asked me where we were getting our doors for the job and what the name of the company was, and I gave him the name of the company and also the telephone number, and he was going to check on the doors he said.

* * * * *

Q. (By Mr. LeBaron): Mrs. Sweitz, you gave the address of the office as 1721 New Jersey Street; would you describe where that is, not the address, but the type of business that is being done there?

A. Well, it is on the job of the White Memorial Hospital job.

(Testimony of Bonnie Lou Kaiser.)

Q. And by that do you mean the construction site of the [11] hospital?

A. Yes, the construction site.

* * * * *

Cross Examination

Q. (By Mr. Nicoson): Mrs. Kaiser, while you were employed by Havstad and Jensen, I believe you said your duties were that of a secretary.

A. That is right.

Q. For Mr. Havstad and Jensen?

A. Secretary and office worker.

Q. You worked rather closely with them? [12]

A. That is right.

Q. And did you handle any personal correspondence? A. Yes, some in the office.

Q. And you took your instructions directly from them; is that right? A. Yes.

Q. From them and Mr. Nicholson, who is the superintendant of construction on the White Memorial Hospital project; is that correct?

A. That is correct.

Q. Now, did you have any other duties than those which you have described as secretary?

A. The office work, the payroll.

Q. Office work, and you say that you prepared the payroll? A. And checked the time.

Q. Did you have any other duties?

A. Well, the time——

Q. Is that about all of your duties as you have described them? A. I believe that is it.

(Testimony of Bonnie Lou Kaiser.)

Q. That constitutes all of the duties that you performed out there? A. Yes.

Q. You didn't do any carpentry work, I presume?

A. No.

Q. And you were not assigned to hang any doors; is that correct? [13]

A. Not very likely.

Q. Not very likely,—were you or weren't you?

A. No.

Q. In other words, your entire tour of duty was confined to secretarial work within the office; is that correct? A. That is correct.

* * * * *

JAMES LAYTON NICHOLSON

a witness called by and on behalf of the General Counsel, being [14] first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. O'Brien): Will you state your name, please, sir?

A. James Layton Nicholson. N-i-c-h-o-l-s-o-n.

Q. And your residence address, sir?

A. 1151 North Howard, Glendale.

Mr. O'Brien: Mr. Nicoson, do you have a copy of the constitution of the United Brotherhood of Carpenters and Joiners of America?

Mr. Nicoson: No, I don't have it, but I will stipulate that I will obtain one, and that it may go in. Do you need it right now?

Mr. O'Brien: I guess not. And I also would

(Testimony of James Layton Nicholson.)

like to have the copy of the By-Laws and Trade Rules of the Los Angeles District Council of Carpenters.

Mr. Nicoson: That I can supply, I think—let's see if there are any trade secrets in there.

Mr. O'Brien: Thank you. Mr. Nicoson has handed me the By-Laws and Trade Rules of the Los Angeles County District Council of Carpenters. I would like to inquire of Mr. Nicoson if they are the rules that were in effect during August of 1954?

Mr. Nicoson: That is my understanding.

Mr. O'Brien: In view of the statement of Mr. Nicoson, I would like to offer as General Counsel's Exhibit No. 2 the By-laws and Trade Rules of the Los Angeles County District Council [15] of Carpenters.

Mr. Nicoson: No objection.

Trial Examiner: It will be received.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 2 and was received in evidence.)

[See pages 198-200.]

Mr. O'Brien: And in that same connection so we can have the proper name of the respondent, the official name of the Council is that as it appears on General Counsel's Exhibit 2, Mr. Nicoson?

Mr. Nicoson: That is correct—you mean the official name of the Los Angeles District Council of Carpenters?

Mr. O'Brien: Yes.

(Testimony of James Layton Nicholson.)

Mr. Nicoson: I will also stipulate with you that the Complaint may be amended to show the true name of the District Council.

Mr. O'Brien: That same amendment should go to the Complaint, the Charges and the Answer, I think it is also misnamed in the Answer.

Trial Examiner: Is the stipulation clear now as to what shall appear in the caption of the Complaint as descriptive of the District Council?

Mr. Nicoson: I am willing to do this, if Your Honor please, wherever in the formal papers heretofore received in evidence, the name of the Los Angeles District Council of Carpenters appears improperly, the documents may be corrected [16] to show the proper and true name.

Trial Examiner: Is that agreeable to all parties?

Mr. O'Brien: Yes, sir.

Mr. LeBaron: Yes, sir.

Trial Examiner: The formal documents in the file then are amended to incorporate the true and correct name, Los Angeles County District Council of Carpenters wherever the designation District Council appears.

* * * * *

Q. (By Mr. O'Brien): By whom are you employed, Mr. Nicholson?

A. Havstad and Jensen.

Q. And what is your present assignment by your employer?

A. I am general superintendent of construction.

Q. Of what construction?

(Testimony of James Layton Nicholson.)

A. Of all the work on the project, the White Memorial Hospital project or College of Medical Evangelists.

Q. When did you first receive that assignment, if you know?

A. It was on the 1st day of July in 1952.

Q. When was construction started on that project?

A. On the 1st day of July, 1952, we started the preliminary work then. [17]

Q. And have you been in charge of this construction ever since? A. That is right. * * * * *

Q. (By Mr. O'Brien): And as general superintendent, what are your duties, sir?

A. My duties is to see that the job is completed according to plans and specifications.

Q. What trades are under your supervision on this job?

A. Well, I oversee all of the trades, but directly under my supervision is the carpenters and laborers.

Q. Now, over carpenters and laborers do you have a foreman? A. That is right.

Q. Who is he? A. Arnold Steinert.

Q. By the way, when is your target date for completion of this problem? * * * * * [18]

Trial Examiner: Will the reporter read the question?

(Question read.)

Trial Examiner: You may answer that.

The Witness: Well, the basement, the ground

(Testimony of James Layton Nicholson.)

floor, the first, second, and third floors is supposed to be completed by December 15th, for which we have got partial occupancy okayed [19] by the City.

Trial Examiner: Of this year?

The Witness: Of this year. * * * * *

Q. (By Mr. O'Brien): What work remains to be done before December 15th?

A. The main work that remains to be done is hanging of the doors and the setting of a few metal cabinets on the nurses' stations, and they are putting down the finished floor coverings in the halls now, the rooms are completed.

Q. And what doors have to be hung?

A. It is the main wood doors. [20]

* * * * * *

Trial Examiner: The objection is overruled.

What doors remained to be hung? Is that the question?

Mr. O'Brien: That is right.

The Witness: It is all of the wood doors throughout the building that were purchased through Sand Door. In other words, the doors going into all of the rooms, the doors in the toilet rooms and inside are metal, but as to all the wood doors in the job. And then the fire doors which are Durand Doors, and they have been released to us to hang.

Mr. Garrett: I move to strike that entire answer as being non-responsive. The General Counsel is being permitted to evoke argument from this

(Testimony of James Layton Nicholson.)

witness and the response to the last question was to merely state what doors there were to be hung, and this witness has been allowed to go into a general dissertation about the situation, including statements as to what doors had been hung and what doors have not been hung and his conclusions as to why they haven't been hung.

Trial Examiner: I didn't hear any conclusions. True or not the answer went beyond the requirements of the question, but I see nothing prejudicial, and the motion is denied. [21]

* * * * *

Q. (By Mr. O'Brien): How many doors remain to be hung? A. 398. [22]

* * * * *

Q. (By Mr. O'Brien): Now where are those 398 doors?

A. They are in the lobby right where they were before they told us to stop and some of them on the ground floor and some of them on the second floor where the laborers were putting them before the order came through to stop.

* * * * *

Mr. Garrett: We want to move to strike portions of the answer as not being responsive, being conclusions of the witness and being argumentative. We now move to strike the portion of the first sentence of the answer following the words, "Where they were", we move to strike the following words, "When they told us to stop".

(Testimony of James Layton Nicholson.)

Trial Examiner: All right, let that go out. [23]

* * * * *

Q. (By Mr. O'Brien): Do you know when these doors were delivered to the job?

A. They were delivered——

Trial Examiner: The question is, do you know.

Q. (By Mr. O'Brien): Approximately when, sir?

A. They started delivering on the Friday before August 17th.

Q. Did you give Mr. Steinert any instructions relative to the doors? A. I had him start——

Mr. Garrett: Just a minute.

The Witness: Yes, pardon me.

Q. (By Mr. O'Brien): What were your instructions to Mr. Steinert?

Mr. Garrett: Objected to——

Trial Examiner: Overruled.

The Witness: I told him——

Mr. Garrett: We didn't state the grounds.

Mr. Nicoson: We didn't even quite get the [24] word objection out.

Trial Examiner: I will overrule the objection and you can argue it in the brief. Let him answer.

Mr. Garrett: I want the grounds of my objection in the record.

Trial Examiner: It is not going in and I am instructing the witness.

Mr. Garrett: We demand the right to have it in.

Trial Examiner: It is denied to you. You may answer.

(Testimony of James Layton Nicholson.)

The Witness: I told my foreman, Mr. Steinert, to get the carpenters started setting the jigs and getting the horses ready and the benches ready to start hanging the doors and——

* * * * *

Q. (By Mr. O'Brien): Approximately when did you give these [25] instructions to Mr. Steinert; was it Friday or Monday or Tuesday or when?

A. Those instructions were given before the doors arrived. I had a carpenter sent out to hang the doors and he was setting up the jigs to hang the doors before they arrived.

Q. What other preparations did you make?

Mr. Garrett: Just a moment. I am going to make these motions as long as——

Mr. O'Brien: May the reporter read the objection.

Trial Examiner: I think the objection is to the previous answer. You may read it.

(Objection read.)

Trial Examiner: Read the answer.

(Answer read.)

Mr. Garrett: We move to strike all of the answer following the words "those instructions were given before the doors arrived".

Trial Examiner: I will grant your motion. Now, Mr. Nicholson, will you please listen to all of the questions and then if you will give your answer to the question you can save a good deal of this argument, I think. At least, we will try that.

(Testimony of James Layton Nicholson.)

Q. (By Mr. O'Brien): What preparations had you made for hanging the doors?

A. We—— [26]

Mr. Garrett: Objected to as incompetent, irrelevant and immaterial and hearsay as to these respondents and not binding on these respondents.

Trial Examiner: I will overrule the objection. You may answer.

The Witness: I had the jigs made up and the horses and the benches and everything was ready to hang the doors and I had the laborers starting to place the doors on the individual floors where they belonged.

Mr. Garrett: We will move to strike that portion of the answer beginning, "and had the laborers starting", on the grounds that it is not responsive and it is argumentative.

Trial Examiner: Denied. [27]

* * * * *

Q. (By Mr. O'Brien): You described some of the preparations you made for hanging the doors. What other preparations did you make?

A. Just to place the doors around to the individual floors where they belonged.

Q. Before the doors arrived, how many carpenters did you have on the job?

A. Oh, well, let me see. I had about eight all told on the job.

* * * * *

Q. (By Mr. O'Brien): Is the job that you are running there a union or open shop?

(Testimony of James Layton Nicholson.)

A. It is a union—— [28]

* * * * *

Q. (By Mr. O'Brien): Did you make any arrangement to secure any addifional carpenters?

A. Yes.

Q. What arrangement did you make?

A. I had asked the business agent to find me some good door men and to have them to come out to the job.

Q. The business agent being whom?

A. Nathan Fleisher.

Q. And when did you speak to the business agent about having more men?

A. That is before the doors arrived I had the notice that the doors were——[29]

Trial Examiner: You have answered the question.

Q. (By Mr. O'Brien): And did any additional men come out? A. Not at that time.

Q. Now, would you describe the operation of hanging the 398 doors, what each man does on the job?

Mr. Garrett: Objected to as being incompetent, irrelevant and immaterial. Objected to as no proper foundation has been laid.

Trial Examiner: Overruled.

The Witness: The procedure we follow on a job like this is, we have two men go ahead with electric plane and jigs and to have them pre-fit the doors. And then two men follow up with routers and the

(Testimony of James Layton Nicholson.)

bottom plates is put on and two more following up to bore the locks.

Q. And following that?

A. And then the doors are hung.

Q. And these men that you refer——

Mr. Garrett: One moment. All right, thank you.

Q. These men that you refer to, are they carpenters or laborers or some combination of laborer and carpenter?

Mr. Nicoson: What men?

Mr. O'Brien: The men just referred to in the prior answer.

The Witness: They are carpenters.

Q. (By Mr. O'Brien): Do any of the laborers participate in [30] the hanging of the doors?

A. All they do is to distribute the doors to the individual floors.

Q. Have you described the plan that you intended to use on the White Memorial job?

Mr. Nicoson: Just a minute. Objected to as to what he intended to use.

Trial Examiner: I will overrule the objection. You may answer.

The Witness: That is correct.

Q. (By Mr. O'Brien): Now, calling your attention to August 17th, approximately what time did you arrive at the jobsite?

A. As near as I can recall, it was around 11 o'clock.

Q. And what was the first thing that you observed?

(Testimony of James Layton Nicholson.)

A. I went to the office first thing.

Q. You went to the office. And who did you see there?

A. Mrs. Sweitz, the secretary.

Q. And did you receive a report from her?

A. Yes.

Mr. Garrett: Just a moment, please: Pardon me, no objection.

Q. (By Mr. O'Brien): What was that report?

Mr. Garrett: Just a moment, please. Objected to as no foundation laid, objected to as being hearsay as to these respondents. Objected to as being not the best evidence. By the way, I am told by counsel that the witness being referred to has already been on the stand this morning. And objected to as calling for a conclusion of this witness. That last objection relates to the use of the word "report".

Trial Examiner: Of course, it seems probable that this is hearsay.

* * * * *

Trial Examiner: I understand all that. Now the question is, are you attempting to adduce through this witness to [32] establish as a matter of fact anything said to him by Mrs. Kaiser or Mrs. Sweitz in this connection, or are you offering it for the purpose to explain some action which he may have taken based on what he heard?

Mr. O'Brien: Solely the latter, Mr. Examiner.

Trial Examiner: I will overrule it.

Mr. Garrett: May the testimony be received for that limited purpose only?

(Testimony of James Layton Nicholson.)

Trial Examiner: Yes.

* * * * *

Trial Examiner: The last question was what did she report. You may answer.

The Witness: Mrs. Sweitz reported, when I came in the office she says Mr. Fleisher had been on the job and has called the carpenters off from hanging the doors, and she says he is now out in the building.

Trial Examiner: All right.

Q. (By Mr. O'Brien): So what did you do?

A. So I started out to the jobsite.

Q. What was the first thing you observed on the jobsite?

A. When I came into the lobby I observed that the laborers that was supposed to be placing the doors around were not working at the time.

Q. And did you speak to any of the laborers?

A. I did.

Q. What information did you obtain, if any, from the laborers?

Mr. Nicoson: Just a minute, your Honor, objected to on the grounds that it is hearsay. There are no laborers involved in this.

Trial Examiner: Well, it can have a bearing here only as it might explain further action by the witness and I will receive it solely for that purpose and not as intended to establish anything that the laborers may have told him. I will overrule it.

* * * * *

Trial Examiner: Let's find out who. Maybe the witness can tell us.

(Testimony of James Layton Nicholson.)

The Witness: Well, a fellow by the name of Brown was the one laborer. I don't recall the other two. I had three, but I don't recall the other two names but Brown is one of them. All they said is that the union stopped them from hanging the doors, didn't say who but said the union and they was waiting for my foreman to replace them or, in other words, give them other duties is what I am trying to say.

Q. (By Mr. O'Brien): Then what did you do?

A. I went on down to the ground floor directly below the main lobby. [34]

Q. And what did you observe there?

A. When I got down to the foot of the stairs Nathan Fleisher and Max Levine and—wait a minute, pardon me, and Finklestein, Abe Finklestein, were standing there talking, and Arnold Steinert, the foreman. And then Levine was there, when I got to the foot of the stairs he walked off.

Q. Let's get these people identified. You say Nathan Fleisher was there; is that correct?

A. That is right.

Q. And who is Max Levine?

A. He is one of my carpenters, or was at that time.

Q. Max Levine—

A. It was Abe Finklestein.

Q. All right. Abe Finklestein. And you say Arnold Steinert, the foreman?

A. Arnold, yes, the foreman. And Levine was

(Testimony of James Layton Nicholson.)

there and when I came down to the foot of the stairs he walked off.

And did you have a conversation with Nathan Fleisher? A. Yes.

Q. Who was present when you had the conversation with Nathan Fleisher?

A. Those men I just mentioned.

Q. Nathan Fleisher, Abe Finklestein and Arnold Steinert, and no one else was present?

A. The steward came up later but he wasn't there first. [35]

* * * * *

Q. (By Mr. O'Brien): I want you to tell us what the conversation was before the steward came up.

A. I asked Nathan Fleisher why he had stopped the men from hanging the doors. He says he had orders from the District Council that morning to stop them from hanging the doors until they could establish the fact whether they were union or non-union made doors. He says I could have pulled them off yesterday but I waited until today. And I told him at the time that, well, I says that I always thought I should have notice before anybody could be pulled off, and he says, well, those are my orders, so he says we will have to stop hanging the doors until they get cleared by the union.

Q. And then you say the steward came up?

A. Saul Agronovich. And also Sam Agronovich, which was the man that was hanging the doors at the time.

(Testimony of James Layton Nicholson.)

Q. Now Sam—were both carpenters employed by you? A. That is right.

Q. And what conversation took place after they came up? A. Well, Sam——[36]

Mr. Garrett: Just a moment. Objected to as calling for a conclusion, objected to as leading, on the further grounds that no proper foundation has been laid, objected to as being hearsay as to these respondents and to the respondent council.

Trial Examiner: I will overrule the objection. You may answer.

The Witness: When Sam and Saul came up I told them in front of all of them that they might as well pick up their tools, if we can't hang the doors they might as well pick up their tools, that we are practically caught up and they all started picking up their tools. And then I got to thinking it over and decided there was no use in doing that as we needed to put up the butts and jambs and so the painters could match them with the paint. So I told the foreman, Arnold Steinert, to relocate the men and in such a way they could keep on working. [37]

* * * * *

Mr. O'Brien: The witness has described a conversation between himself and Mr. Fleisher and what I am trying to find out is at what point the steward, Saul Agronovich, entered the presence of the two of you.

The Witness: Well, it was when he and Sam came up the stairs there and we were discussing the stopping of the hanging of the doors and I told them

(Testimony of James Layton Nicholson.)

that if we can't hang the doors we might as well lay the men off. He was there at the time when I told them we might as well lay the men off.

Q. (By Mr. O'Brien): Have you made any further efforts to get the doors hung?

A. Yes.

* * * * *

Q. (By Mr. O'Brien): My next question is, approximately when? [38]

A. I don't remember the exact date.

Q. Was it within a day or two of the incident you have described?

A. About a week later.

Mr. Nicoson: Just a minute. You sure have to be pretty fast to get in an objection. I object to it on the ground it was leading.

The Witness: I am sorry, I am kind of hard of hearing.

Trial Examiner: I will overrule the objection. Now the answer was to the question substantially when did you make a further attempt?

The Witness: Approximately a week later, I would say.

Q. (By Mr. O'Brien): What did you do?

A. Well, I took my foreman and I went with him and asked the men if they would hang the doors and why——

* * * * *

Q. (By Mr. O'Brien): In that connection, did you have any conversation with the union steward?

(Testimony of James Layton Nicholson.)

A. Yes. He was the first one I asked that or the first one I had my foreman ask. [39]

Q. Your foreman was present and Saul Agronovich was present, and was anyone else present?

A. Yes.

Q. Who?

A. Lou Feldman, he was working with Saul at the time.

Q. And is he a carpenter? A. Yes.

Q. And what was your conversation with Saul Agronovich, or what conversation did you overhear?

A. You want me to explain the whole conversation?

Trial Examiner: Just tell us what you heard.

The Witness: Well, Steinert, the foreman, asked Saul, he says will you hang these doors. And he says not unless we get clearance from the union.

Q. (By Mr. O'Brien): Was that all he said?

A. Yes, he said not unless we get clearance from the union.

Q. Did you overhear, did Mr. Steinert say anything to Mr. Feldman?

A. Yes, he asked him the same question. Mr. Feldman said he would be glad to hang the doors if they got clearance from the union.

Q. And then what did you do?

A. Then we went to Charlie Franklin next.

Q. And by "we" you mean——

A. Arnold Steinert and myself, that is right. [40]

Q. And who is Charlie Franklin?

(Testimony of James Layton Nicholson.)

A. He is one of my main carpenters, a cabinet man.

Q. And what was the conversation there?

A. We asked him the same question and he said not unless they get clearance from the union.

Q. And next?

A. Next we went to a man by the name of Shand. He said I don't intend to get my neck in a sling, those were the words he used.

Q. Anyone else?

A. Then we went up on the fourth floor to Harold Lokna.

Q. Who?

A. Harold Lokna. He said he couldn't afford to——

Mr. Nicoson: Just a moment. He said they went up.

The Witness: We went up, in other words, Steinert and myself.

Mr. Nicoson: All right.

The Witness: To Harold Lokna.

Q. (By Mr. O'Brien): And is he a carpenter?

A. Yes, and he said he couldn't afford to.

Q. Anything else?

A. That was all, that is all the carpenters I had on the job at that time.

Q. Have you had any other conversations with the steward about these doors? [41]

A. Yes, we talk about them every day.

* * * * *

(Testimony of James Layton Nicholson.)

Q. (By Mr. O'Brien): Do you recall your most recent conversation about the doors?

A. This morning.

* * * * *.

Q. (By Mr. O'Brien): This morning where was the conversation?

A. I couldn't just say where, but if I remember right it was on the second floor but I just couldn't say for sure.

Q. Was anyone else present?

A. Yes, Lou Feldman was with him again.

Q. Who? A. Lou Feldman.

Q. And what did you say and what did Mr. Agronovich say?

A. Well, he said: "I see you are all dressed up again." I said: "Yes, I am going back to court." And he said, I will sure be glad when this is all settled, and I said, so will I. [42]

Q. Do you recall any other conversation about the doors with Mr. Agronovich? A. No.

Q. Have you made any other efforts to get these doors hung? A. Yes.

Q. Approximately when?

A. Let's see, I believe it was Monday of this week.

Trial Examiner: Monday of this week?

The Witness: I mean, no, not this week. It was Monday; it was one day last week. I couldn't say or tell you just what day it was.

Q. (By Mr. O'Brien): What effort did you make?

(Testimony of James Layton Nicholson.)

A. A fellow by the name of Jacobson, a former carpenter of mine, asked me if he could get back on the job again. He is one of my old time men. And I said, yes, if you will hang the doors I will put you on right now.

Q. And what did he say?

A. He said: "I've been told about the doors," and he smiled and said, thank you just the same.

* * * * *

Cross Examination

Q. (By Mr. Nicoson): How long have you occupied the position of general superintendent, Mr. Nicholson? [43]

A. I have been with Havstad since 1931.

Q. 1931. And since 1931 have you occupied the position of general superintendent with Havstad and Jensen?

A. No, this is the first joint venture they have had.

Q. What do you mean, this is the first joint venture they have had?

A. This hospital job under Haystad and Jensen is a joint venture.

Q. With whom?

A. With Havstad and Jensen.

Q. Does Havstad have a joint venture with Havstad and Jensen?

A. I don't, well, I don't know how you state it. In other words, Havstad and Jensen is working on this job as a joint venture. I think that is as clear a way as I can state it.

(Testimony of James Layton Nicholson.)

Q. And you mean that there is just Havstad and Jensen in this venture? A. That is right.

Q. Just the two of them? A. That is right.

Q. And how long have you been in the construction business, Mr. Nicholson? A. All of my life.

Q. Have you heard the term joint venture used before? A. Yes.

Q. Have you ever—— [44]

A. Joint venture or joint venturers some of them call it.

Q. Have you ever had any experience with a joint venture before?

A. No, this is my first time.

Q. Have you ever worked where the construction job was a joint venture that you know of?

A. Not until this time, no.

Q. This time? A. Yes, that is right.

Q. Where did you receive your information that this was a joint venture?

A. From the contractor's license that is right on it.

Q. From the contractor's license, whose name is on it?

A. Havstad and Jensen joint venture it says.

Q. And no other names on that? A. No.

Q. Do you know what arrangement, if any, the Havstad and Jensen people have with the White Memorial Hospital?

A. Yes. Havstad and Jensen work as agents for the College of Medical Evangelists.

(Testimony of James Layton Nicholson.)

Q. And what is the College of Medical Evangelists?

A. The College of Medical Evangelists is a medical school and nurses training school owned and operated by the Seventh Day Adventists of which they are members, and so am I.

Q. Now the College of Medical Evangelists, do they own the [45] White Memorial Hospital, or do you know?

A. The College of Medical Evangelists owns and operates the White Memorial Hospital for the denomination of the Seventh Day Adventists as near as I can state it.

Q. Now, you stated that Havstad and Jensen were the agents of the College of Medical Evangelists, is that correct?

A. That is correct, they work as agents for the College of Medical Evangelists. In other words, they represent the church on the job.

Q. From what source did you obtain that information, if you did?

A. It is in all of our agreements and in all of our letterheads and on all our purchase orders, all the way down the line it says College of Medical Evangelists, agents for College of Medical ~~Evangelists~~.

Q. Well, now, I am not sure that you properly stated yourself. You said that the College of Medical Evangelists are agents for the College——

A. No, Havstad and Jensen. In other words, in all of our contracts with the architects and the owners and everything, all of our purchase orders and

(Testimony of James Layton Nicholson.)
all of our letterheads, everything is written right on it, it is written Havstad and Jensen, agents for the College of Medical Evangelists. [46]

* * * * *

Q. And when an order is placed for material, is it placed by Havstad and Jensen as agents of the College of Medical Evangelists?

A. The purchase order reads Havstad and Jensen, agents for College of Medical Evangelists.

Q. And I take it that in this two year period you have paid some bills or that some bills have been paid on this construction have been paid by you?

A. I okay all of the bills.

Q. You okay all of the bills. And do you sign the checks?

A. I do some of them. In other words, Havstad and Jensen and myself sign the checks on the payroll only. The balance of the bills are paid by the College of Medical Evangelists.

Q. Now the payroll checks are issued by the College of Medical Evangelists; is that correct?

A. It says right on the check Havstad and Jensen, agents for College of Medical Evangelists.

Q. And is there a special account to which that check is directed?

A. Yes. In other words, we have an account set up by the College of Medical Evangelists for the payroll. That is put [47] in the bank and is reimbursed each week after the payroll is made.

Q. Insofar as you know, do Havstad and Jensen

(Testimony of James Layton Nicholson.)

have any of their money deposited in that account?

A. No.

Q. Is there a contract between—strike that. Is there any paper that you have seen which you understand to set out the relationship between Havstad and Jensen and the College of Medical Evangelists?

A. Yes.

Q. Are you familiar with the contents of that document? A. Yes.

Q. And do the contents of that document generally reflect the information which you have just given as to their relationship?

A. That is right.

Q. Now, is your personal check, I mean the check for your services, is that also written on this same account?

A. The same payroll account, that is right.

Q. The College of Medical Evangelists with Havstad and Jensen as agents?

A. Havstad and Jensen, agents for the College of Medical Evangelists, that is right.

Q. Have you had occasion while working on this project to place orders for materials with suppliers?

A. Yes, I place orders right along.

Q. And do you place that order in the name of Havstad and Jensen?

A. On the regular purchase order forms.

Q. In the name of Havstad and Jensen as agents for the College of Medical Evangelists?

A. That is right.

Q. Do you know of any material which has gone

(Testimony of James Layton Nicholson.)

into the project out there that has not been obtained by that same means? A. No.

Q. All of it?

A. That is right. Let me take that back. In other words, there are certain items of equipment—I would like to make this clear—there is certain items of equipment that is purchased by the hospital itself and we install it, but it is not material in the construction of the job. In other words, certain items of equipment that is purchased by the hospital itself. I wanted to make that clear.

Q. That would be in the nature of hospital equipment, would it?

A. Yes, but we install it, have to see that it is installed. It is in the subcontractor's contract to install it, but it is purchased by the hospital itself, but we install it, and it is written in the contract that we install it, but it is purchased by the hospital. [49]

Q. And what you are now talking about—and you can correct me if my assumption is wrong—what you are talking about is the equipment, for example, that goes into the operating room, X-ray machine—— A. And sterilizers.

Q. Yes, sterilizers or laundry equipment?

A. That is right. In other words, it comes under a separate item as equipment underneath the schedule as the budget is set up.

Q. You have nothing to do with the purchase of that, all you have to do is to take care of the installation?

A. Installing and coordinating it and see that it

(Testimony of James Layton Nicholson.)

all gets roughed in the building and operating when the building is completed, that is right.

Q. Do you know a Mr. Sam Agronovich?

A. Yes.

Q. Has he ever been employed on the project out there on New Jersey? A. Yes.

Q. And he is a carpenter, is he not?

A. That is right.

Q. And in what capacity?

A. I hired him to hang doors but when I asked—may I go ahead?

Q. Go right ahead. [50]

A. When I asked for him to come out I told him I would use him for building cabinets and such things as that until the doors arrived and we needed him for that work.

Q. But your main purpose in asking for him was to hang the doors?

A. That was what I asked for him for to hang the doors, I asked for a good door hanger and the doors had not arrived and so I asked for him with the idea that he could do some cabinet work until they did arrive.

Q. In other words, you were to fill him in on other work until they arrived but his job was to hang doors?

A. His job was to hang doors, that is right.

Q. Now, did you at any time employ any other men especially for the purpose of hanging doors?

A. Yes.

Q. And who were they?

(Testimony of James Layton Nicholson.)

A. Well, there is a fellow by the name of Allen, a colored carpenter, which Nathan Fleisher sent to me after the doors had been on the job and he said that he felt that they were going to be cleared, and I also hired him with the idea that he could do some work on cabinets or anything that was there until the doors were cleared and we could hang them.

Q. Did you ever assign Allen to hang the doors?

A. He hung the first doors that had been hung, that is the metal doors and fire doors. [51]

Q. So he has been assigned to hang the metal doors?

A. The metal, well they are a Truscon door and all you do is put the pin in.

Q. And he didn't have——

A. There is no fitting on those, you see.

Q. When did Mr. Allen come on the job?

A. I couldn't remember the date he came on the job but he worked for me for some time until I got caught up.

Q. Could you tell us approximately how long he was on the job out there?

A. Well, let me think now. It was approximately a week after the 17th, as I recall, that Nathan Fleisher sent him out to the job and he worked for me until about two weeks or a week and a half ago, I don't remember exactly what time he finished hanging the fire doors I had there, and at that time I let him go because I had no more for him to do. That is as near as I can recall it.

Q. Now you say that he was employed approxi-

(Testimony of James Layton Nicholson.)

mately a week after August the 17th; is that correct?

A. It is somewhere approximately a week after, yes, because it was in the following week when Nathan Fleisher said that he thought that the doors were going to be cleared and for me to call Thomas, and at that time I told him, well, if there is any chance that we might get them cleared, you might send me a good carpenter and I will work him in on cabinets or [52] whatever I got until we can hang the doors and you can send him on so I have a good man there. [53]

* * * * *

Q. (By Mr. Nicoson): On the morning of the 17th, I believe it was then that you stated that you came on the job out there around about 11 o'clock; is that correct? A. That is right.

Q. And you had this conversation with Mrs. Kaiser; is that right? A. That is right.

Q. After you had the conversation with Mrs. Kaiser which you have testified to, did you then go out to see Mr. Steinert?

A. I went out first to the lobby, yes, and then down to where they were on the ground floor.

Q. Mr. Steinert was the foreman on the job, was he?

A. He is the foreman on the job.

Q. And he is in charge when you are not there; is that correct?

A. He is in charge. In other words, I give all of

(Testimony of James Layton Nicholson.)

my orders to Mr. Steinert, and he transfers my wishes to the men.

Q. And so you went out there to see Mr. Steinert to find out what was going on?

A. I went out to see Mr. Fleisher.

Q. You went looking for Mr. Steinert?

A. No, I was looking for Mr. Fleisher.

Q. But you did see Mr. Steinert? A. Yes.

Q. You saw Mr. Steinert? [54]

A. I went directly to Mr. Fleisher.

Q. And did you see Mr. Steinert before you went directly to Mr. Fleisher? A. No.

Q. Where was Mr. Fleisher at the time that you saw him?

A. He was on the ground floor.

Q. Whereabouts on the ground floor?

A. Right at the foot of the stairs.

Q. And where are the stairs?

A. Well, coming into the lobby, you have two elevators, just to the right-hand side of the elevators there is the stairs leading down, down to a landing and down to the ground floor, and it was directly at the foot of the stairs, that is where.

Q. And this stairway that you are talking about, is it close to the entrance, the lobby entrance?

A. That is right, one floor directly, right below the lobby by the entrance, that is right.

Q. Then physically, the lobby entrance comes in on the second floor?

A. No, we have a basement and then the ground

(Testimony of James Layton Nicholson.)

floor and then the floors are numbered, they start two, three, four and five.

Q. I see, and there is a floor above the ground floor? A. That is right.

Q. And you have to go through the lobby down the stairs? A. That is right. [55]

Q. And you went to the ground floor and there you saw Mr. Fleisher? A. That is right.

Q. Was he standing at the foot of the stairs?

A. They were there talking, yes.

Q. Who was talking?

A. Abe Finklestein, Arthur Steinert and Nathan Fleisher, and Levine was there when I came down, and then he walked off.

Q. And did you hear anything that these three men said at the foot of the stairs?

A. When I first came down there, I asked the questions myself.

Q. Pardon me, let's establish a little contact here.

A. Okay.

Q. Before you started your questions, did you hear anything that any of these men said?

A. No, no, I asked the first question myself.

Q. And when you got down there, what was the first question that you asked?

A. I asked why he had pulled the men off the job.

Q. Asked who? A. Fleisher.

Q. Is that about what your words were, why did you pull the men off the job?

A. That is right.

Q. And Mr. Steinert was there at the time? [56]

(Testimony of James Layton Nicholson.)

A. Yes.

Q. And Mr. Finkelstein? A. That is right.

Q. And then Mr. Finkelstein left?

A. No, Levine left.

Q. Levine left before you got down there?

A. As I came down the stairs, yes.

Q. Before you arrived at the spot of the conversation, Levine was gone?

A. As I was coming down the stairs, yes, as I was coming down, he walked away.

Q. So when you got there where you started the conversation; Levine had left? A. That is right.

Q. And upon your arrival, Mr. Finkelstein left immediately too? A. No.

Q. Are you sure about that?

A. I am sure Finkelstein stayed there.

Q. So you then asked Mr. Fleisher, you asked why he had done what?

A. Why he had pulled the men off the job.

Q. I see, and did he make any reply to that?

A. Yes.

Q. What did he say? [57]

A. He said that he had word from the District Council that morning to stop them from hanging the doors until they could be established if they were union or non-union.

Q. What else did he say?

A. He said that *he orders* to pull the men off the job.

Q. And that is when you lost your temper?

(Testimony of James Layton Nicholson.)

A. That is when I lost my temper I am sorry to say, but I did.

Q. And you started issuing orders?

A. That is when I said that the men might as well pick up their tools.

Q. And upon a calmer reflection, you retracted those orders?

A. Yes, I told Mr. Steinert to relocate the men so they could keep on going.

Q. Well, now, as a matter of fact, Mr. Finkelstein did the same type of work after your conversation for the remainder of the day that he had been doing prior? A. That is right.

Q. And the same is true with regard to Mr. Levine?

A. Mr. Levine did the same, they were building the cabinets.

Q. So, as far as you were concerned, you countermanded your bit of temper, and they still kept on doing the same thing that they had been doing previously? A. That is correct.

Q. And I believe it is also your testimony—strike that, [58] please. I believe also you did not ask either Mr. Finkelstein or Mr. Levine to hang any doors that day? A. No, I did not.

Q. I believe also you did not ask anybody else to hang any doors that day; isn't that correct?

A. We were just getting started setting up. Pardon me, no, I did not. You see, I am not used to this, Your Honor, and it is hard for me to keep from explaining myself.

(Testimony of James Layton Nicholson.)

Q. Now, this laborer that you mentioned, I believe you recalled his name as being Brown?

A. Yes, we call him Preacher Brown.

Q. And there were two of them?

A. Three of them, Steinert had already started having them place the doors on the different floors.

Q. And where were they?

A. They were in the lobby as I came in the door, and they was there in the lobby, and one of them had a broom. In other words——

Q. Just tell us what he was doing.

A. Oh, he was just standing there brushing the broom back and forth, and I says how come you are not working, and, well, he said the union stopped us.

Q. And is that all he said?

A. That is all he said, and I said I would get them lined up as soon as I could find Steinert, and then I went on to [59] find Steinert and see what had, see what he had in mind.

Q. I take it that your conversation with the three laborers was very brief?

A. That is correct, then I went on down below.

Q. And you just spoke to them in passing, you hardly hesitated, did you?

A. That is right, but we had to reline them on new work.

Q. And you were building up a little steam about that time, were you not?

A. Yes, I was, I am sorry to say.

Q. Now, about a week—strike that. Now, about, I guess about a couple of weeks ago, after you testi-

(Testimony of James Layton Nicholson.)

fied in the proceedings before Judge Westover—do you recall when you so testified? A. Yes.

Q. You then, after your testimony, and after hearing the evidence in that case, went out and asked some other people to hang doors, didn't you?

A. That is right.

Q. Now, who was the first person after hearing that testimony—by the way—strike that. Who was the first person you talked to about hanging doors after you heard the testimony up there before Judge Westover?

A. After we were told not to hang doors until they was cleared, I never asked anybody until the morning I took my [60] foreman——

Q. I am sorry, maybe I did not phrase the question properly. After testifying before Judge Westover and hearing the evidence up there—by the way, I believe that was on October 4?

Mr. O'Brien: Monday, October 4.

Q. (By Mr. Nicoson): Do you remember that to be the date? A. Yes.

Q. After that, now, who is the first person that you talked to about hanging the doors after you got off of the witness stand?

A. I just don't quite get what you mean by the first person I talked to.

Q. Did you talk with anybody about hanging the doors before you went out to talk to the men?

A. Yes, but not that particular day. Naturally, I talked it over with Haystad and Jensen and Stein-

(Testimony of James Layton Nicholson.)

ert, and I talked about it, well, Steinert and I talked about it on the way home.

Q. Who else did you talk to *to* before you went out and asked the men?

A. On that particular day I didn't ask the men.

Q. On any other day before you talked to the men?

A. Mr. Sand called me and brought up the question—is it all right for me to carry on?

Q. Go ahead. [61]

A. He called up and brought up the question that they had talked about in court that I hadn't asked any other men. And he wanted to know if I would ask them. I told him I can't ask myself, I will have to have my foreman go with me and let him ask if they would hang the doors.

Q. And who is Mr. Sand?

A. Mr. Sand of the Sand Door and Plywood Company.

Q. Are you acquainted with Mr. Sand?

A. No, I am not.

Trial Examiner: Will you find a good place to break and we will take the noon recess.

Q. (By Mr. Nicoson): Was this conversation over the telephone? A. Yes.

Q. Had you ever talked with Mr. Sand over the telephone before? A. Not myself, no.

Q. Have you since? A. No.

Q. Did he call you or did you call Mr. Sand?

A. He called me.

Q. And when did he call you?

(Testimony of James Layton Nicholson.)

A. It was in the morning, I don't know just what time.

Q. The next day after you had testified?

A. No, I don't recall just what day it was. [62]

Q. But it was either that next day or the next one after that?

A. Right in there, I don't remember, the next or the next one after that, but it was right in there—no, I remember it was on a Tuesday, and as I recall, it was Tuesday, so that would have to be the next day.

Q. That is right.

A. Because I recall now, it was on a Tuesday.

Q. And what did Mr. Sand say to you?

A. He just said that in court it was brought up the question that I hadn't asked more men to hang the doors and they wanted to know if I would ask more men.

Q. Mr. Sand asked you that?

A. Yes, and I agreed with him, and I told him I hadn't asked more men to hang the doors because I am a union man myself, so I said yes, I will ask my foreman to go with me. I didn't tell him he had to, but I asked him to go with me and ask the men if they would hang the doors and why, and that is what I did. [63]

* * * * *

Q. (By Mr. Nicoson): Mr. Nicholson, after you had this conversation with Mr. Sand, did you thereafter have a conversation with Mr. Steinert?

A. Yes.

(Testimony of James Layton Nicholson.)

Q. And that is your foreman?

A. Yes. [65]

Q. Your carpenter foreman?

A. That is right.

Q. And where did that conversation take place?

A. Over in front of the church project which is right across from the main hospital project.

Q. You mean across the street?

A. Yes, sir.

Q. Mr. Steinert was over there directing some work over there? A. That is correct.

Q. Now, when you talked with Mr. Steinert the first time after you received the call from Mr. Sand, can you give us about the date that occurred on, would that be on the Tuesday, October 5th, approximately?

A. It would be awfully hard to give the date, I just don't remember.

Q. Well, assuming, I think it is a fact that we were all in Federal Court on October 4th, being a Monday.

A. Yes, I believe it would be the following day.

Q. The following day, which would be October 5th?

A. That would be right, to the best of my recollection.

Q. When you talked with Mr. Steinert, was there anyone there except the two of you when you first talked with him?

A. When I first talked there was just the two of us.

(Testimony of James Layton Nicholson.)

Q. Now, what did you say to him and what did he say to you? [66]

A. I asked him if he would go with me over to the main hospital building and ask the carpenters if they would hang the doors.

Q. And did you tell him about your conversation with Mr. Sand?

A. I did in the process of the conversation, but I don't remember if I did right at that time.

Q. Well, is it fair to state that after you and he began this conversation across the street, that you both went over to the hospital project together?

A. We both walked across the street together, yes.

Q. Over to the hospital?

A. That is right.

Q. And on the way over to the hospital, I take it that you had more conversation?

A. That is right.

Q. And will you tell us as best you can recall from the very beginning, from the time that you first went to Mr. Steinert at that time, all you said to him and all he said to you, just up to the time you arrived at the hospital steps?

A. Well, I asked him if he would go with me and ask the men if they would hang the doors. I told him that I did not want him to say or do anything that would be a violation of the working rules, because, after all, that would make me be giving orders to have them doing something in violation of the [67] rules, and if he did it, he would be going

(Testimony of James Layton Nicholson.)

against the working rules. But I felt that in all fairness to Havstad and Jensen and to the College of Medical Evangelists, which I represent, that I wasn't going against any rules by asking the men if they wanted to, that I felt I could ask that, and when they said no, I would ask why. And that is the basis of it, and he agreed to do it, and we went over, as I have stated before, we went over and asked the men.

Mr. O'Brien: If I may interrupt for a moment. I would like to know of this witness whether he is repeating what he said to Mr. Steinert, or is he now stating something that was in his mind as an inducement to what he said to Mr. Steinert.

The Witness: I don't quite get that.

Mr. O'Brien: Well, what you have just told us, is that what you said to Mr. Steinert and what he said to you?

The Witness: Yes.

Q. (By Mr. Nicoson): Those are the words used between the two of you at the time that you met him and walked over to the hospital project?

A. That is right.

Q. Now, at that time, did you tell Mr. Steinert that you had had this call from Mr. Sand?

A. I told him, yes.

Q. And did you tell Mr. Steinert that Mr. Sand suggested that you go out and ask these people if they would hang the [68] doors?

A. That is right.

Q. What did you say about that, what did you

(Testimony of James Layton Nicholson.)

tell Mr. Steinert about your telephone conversation with Mr. Sand?

A. I told him that I would like to know myself what the reaction of the men would be.

Q. Well, is that what Mr. Sand told you to find out, to find out what the reaction would be?

A. He asked me to find out whether the men would hang the doors.

Q. Mr. Sand told you this, or did he tell you that?

A. That is what I collected from his request, was for me to go out and ask the men if they would hang the doors.

Q. My question is whether or not you told Mr. Steinert that Mr. Sand had suggested that you go out and find out whether the men would hang the doors or not.

A. To the best of my recollection, I told Mr. Steinert of the conversation with Sand, yes.

Q. Well, do you recall telling Mr. Steinert that Mr. Sand had said to go out and ask the men if they would hang the doors?

A. I don't remember how I stated it, other than I told him that Mr. Sand had called me and asked me if we would ask the men to hang the doors. I hesitated at first, and then I told him, yes, I would ask the foreman if he would ask them as [69] superintendent on the job, because it would be out of my jurisdiction, and I wanted the foreman to ask so it would be authentic.

Q. And that is what you told Mr. Steinert that

(Testimony of James Layton Nicholson.)

Mr. Sand had said to you over the telephone; is that correct?

A. That is correct. I wanted to know on my own, and I told him that I wanted to know if the men would hang the doors and get their reaction to it.

Q. By the way, you said that you were a union man yourself? A. That is right.

Q. And what organization do you belong to?

A. The carpenters.

Q. What local? A. 1913, Van Nuys.

Q. Now, after you and Mr. Sand got to the hospital door, I assume that you went on inside?

A. You mean Mr. Steinert?

Q. Mr. Steinert, thank you.

A. That is right.

Q. Did you have a conversation with some carpenters then?

A. We went right to Saul Agronovich, which is the steward.

Q. Was he at work? A. Yes.

Q. In the basement?

A. On the ground floor. [70]

Q. And is that sometimes referred to as the basement?

A. No, you see the job is on a hillside, and the lobby comes off of New Jersey on the first floor level, but you have two floors which is the ground level and the basement. It might be referred to as actually as two basements.

Q. And you say that Saul Agronovich was working on the ground floor?

(Testimony of James Layton Nicholson.)

A. That is right.

Q. What was he doing?

A. Making bases for the lockers.

Q. Bases for the lockers?

A. That is right.

Q. And is that carpenter work?

A. That is right, they are made out of plywood.

Q. And is that sometimes referred to as finished carpentry work as distinguished from rough carpentry work? A. That is right.

Q. All right, now, who spoke to Saul Agronovich first, if you recall?

A. I believe Mr. Steinert did. In fact, I am pretty nearly sure, but I wouldn't say for sure on that.

Q. What did Mr. Steinert say to Mr. Saul Agronovich?

A. He told him, well, he asked him the question, he said, would you be willing to hang the doors.

Q. And did Mr. Agronovich say, what did he say? [71]

A. Agronovich said he would be glad to hang the doors if we could get clearance on them, it was just a matter of getting clearance.

Q. And after you talked to Saul Agronovich, you went to who?

A. To Lou Feldman. You see, we pair the carpenters off in pairs, and it is more or less a policy to keep them in pairs throughout the job and keep them with the same partners.

Q. And was this Lou Feldman there at the time?

(Testimony of James Layton Nicholson.)

A. That is right.

Q. And did you ask him the same question?

A. Asked him the same question.

Q. And what did you say to him?

A. Asked if he would be willing to hang the doors.

Q. And what did this Lou Feldman say?

A. His reaction was the same, he would hang the doors if they got clearance.

Q. Now, then, you went to somebody else, did you?

A. Then I went to Charlie Franklin, or we did.

Q. You mean with Mr. Steinert?

A. That is right.

Q. And where was he?

A. He was on the same floor, and he was building a cabinet.

Q. And was he working near Mr. Agronovich and Mr. Feldman?

A. About as far as from here to the door over there from where they were, yes. [72]

Q. And Mr. Feldman and Mr. Agronovich were working together, were they?

A. Working right together, they are partners.

Q. And you say it is about as far, or it was about as far as from here to the door, which is about fifteen feet, would you say?

A. About twenty feet away.

Q. And then you talked with this other gentleman? A. That is right.

Q. And what did you ask him?

(Testimony of James Layton Nicholson.)

A. I asked him, or Arnold Steinert asked in my presence, if he would be willing to hang the doors.

Q. Did Saul Agronovich go with you over to ask the third gentleman? A. No.

Q. Did Mr. Feldman? A. No.

Q. Did Mr. Agronovich and Mr. Feldman continue to work after they had answered your question? A. Yes, they did.

Q. And are they still on the job?

A. They are still working, that is right.

Q. Now, this third man that you asked, did you ask him if he would hang the doors?

A. Asked if he would be willing to hang the doors, yes. [73]

Q. If he would be willing to?

A. That is right.

Q. And what did he say?

A. He said he would have to have clearance.

Q. Have to have clearance?

A. That is right.

Q. All right, and then did you go to see another person?

A. Mr. Shand, that is right.

Q. And where was Mr. Shand?

A. Mr. Shand was out in the hall. Oh, I would say he was about twenty-five feet from the stair leading up to the next floor.

Q. In other words, he was approximately there in the same room?

A. In—not in the room; but out in the hall beyond the room.

(Testimony of James Layton Nicholson.)

Q. In the hall? A. Yes.

Q. And was he by himself?

A. He was by himself.

Q. And you say that you and Mr. Steinert went to talk to him?

A. That is right.

Q. And did Mr. Steinert ask the same question again?

A. That is right. And he hesitated, and then he said I can't afford to get my neck in a sling. [74]

Q. What did Mr. Steinert ask him?

A. He asked if he would be willing to hang the doors.

Q. And then Mr. Shand replied what?

A. He said I can't afford to get my neck in a sling.

Q. And then from Mr. Shand you went to a Mr. Lokna; is that correct?

A. Lokna, Harold Lokna.

Q. Where was he?

A. He was on the fourth floor.

Q. And just you and Mr. Steinert went to him?

A. That is right.

Q. Mr. Steinert asked him the question?

A. That is right, if he would be willing to hang the doors.

Q. And what was his reply?

A. He said I can't afford to.

Q. I can't afford to?

A. That is right.

Q. Now, after you talked with Mr. Shand, did

(Testimony of James Layton Nicholson.)

he continue on doing the work he had been doing?

A. That is right.

Q. And is he still doing it?

A. He is the one that had a heart attack and is in the hospital for the time being.

Q. Until he had his heart attack, he continued with the work, continued to perform his assigned work? [75]

A. Right.

Q. And Mr. Lokna, after he had this conversation with you, did he continue on doing his work?

A. He is continuing, he and Charlie Franklin are working as a pair and they are still working on the cabinets.

Q. And you talked with Mr. Franklin?

A. Mr. Franklin was the third man we talked to.

Q. The third man? A. Yes.

Q. And he was the fellow that was about twenty feet away?

A. About as far as to the door, yes.

Q. And your estimate of that would be about twenty feet?

A. Somewhere in there, twenty or twenty-five feet, yes.

Q. Now, are those the only persons that you asked if they would be willing to hang the doors?

A. At that particular time, yes, that is right, they were the only carpenters that we had on that particular job at that time, you see, the job is right

(Testimony of James Layton Nicholson.)

at the completion point, and they were the only carpenters that we had there at that time.

Q. Now, did you ask Mr. Fleisher about that time to furnish you with men to hang the doors?

A. It was before that time.

Q. Now, I am asking about this time.

A. No, not at that time.

Q. And have you since? [76]

A. Since that time we have asked Mr. Fleisher, yes.

Q. You have since that time asked Mr. Fleisher to furnish you men to hang the doors; is that right?

A. Yes, yes, that is right. I didn't myself, but the contractor did.

Q. And who is the contractor?

A. Jensen.

Q. Were your there when Mr. Jensen made the request? A. Yes.

Q. Was Mr. Fleisher there in person?

A. Yes, in our office at the time.

Q. In your office, and there were just the three of you?

A. No, the new fellow that took over Mrs. Sweitz' job there in the office, and I can't think of his last name, but he was there.

Q. Anyhow, he was the office employee that was there? A. That is right.

Q. He was there acting as sort of a secretary to Mr. Jensen and Havstad and to you?

A. That is right, in other words, he is the man that took over the office now.

(Testimony of James Layton Nicholson.)

Q. All right, what did Mr. Jensen ask Mr. Fleisher?

A. He asked if he would be able to get men to hang the doors, that it was getting to the critical point, that we had to get the doors hung, and he answered he couldn't do a thing until [77] things cleared up in court or anyway, things were cleared up.

Q. Mr. Fleisher said that?

A. That is right, he said I can't commit myself in any way until things are cleared up; and we never asked him to say any more, that is all he can do.

Q. And you say that this conversation that you have told us about took place in the office?

A. That is right, in fact, Mr. Jensen called Mr. Fleisher on the telephone and asked him to come out, that we wanted to talk to him.

Q. Now, while you were having this conversation with Mr. Fleisher in the office, were there any carpenters in there?

A. Not that I know of, no.

Q. And was it your usual practice when you need men as carpenters, *do to* that?

A. If I need men, I call into the hall and get them sent up through the hall. If we have men, say, in another locality, then we get clearance for them to clear into the hospital job.

Q. In other words, you send in a written request? A. Written or by telephone.

Q. Or by phone?

(Testimony of James Layton Nicholson.)

A. That is right, most of the time it is by phone, and sometimes on the transfers, then I send in a written order to transfer them from one job to another.

Q. When you telephone into the office for men, do you always [78] talk to Mr. Fleisher?

A. I ask Mr. Fleisher personally, yes.

Q. I am asking you if you always talk to Mr. Fleisher? A. Yes, I always do.

Q. In other words, if Mr. Fleisher isn't there, you do not place your order for men?

A. No, I don't.

Q. And so you have the telephone answering service, you tell them to have him call you?

A. I always call back; I don't ask them to call me, I call back.

Q. Now, have you filed with this union any written requests to transfer men over there for the purpose of hanging these doors?

A. No, I have not.

Q. Have you made any oral request for any specific men to hang the doors?

A. I just asked him for door carpenters, in other words, first-class door men.

Q. But you haven't asked for any named person to be assigned as the door hanger.

A. No, because we feel that he has the judgment of the men in the hall and knows which is the best door men.

Q. But the point is that you have not asked for any named person? [79]

(Testimony of James Layton Nicholson.)

A. No, not for any named person, just for door men.

Q. Is it fair to state that the only conversation that you have had with Mr. Fleisher with respect to the furnishing of men for hanging the doors was the one that you have just related, which took place between Mr. Jensen and Mr. Fleisher, at which you were present and also the new office manager or secretary?

A. That and the time he stopped the men are the only two that I brought up the question of the doors, other than to say that I would be glad to get it settled because it was getting urgent. In fact, I have mentioned that to him several times, but I never stepped out of line to ask him to do it.

Q. Well, now, you said a moment ago that you represented the College of Medical Evangelists?

A. That is right.

Q. Just what do you mean by that?

A. Well, the College of Medical Evangelists is owned by the Seventh Day Adventists which I am a member of, and I have worked on their institutions practically all of my life as an agent or representative. In other words, I have the interest of the job at heart, being a member, and with the Haystad and Jensen firm because we have done their hospital construction over a period of years.

Q. Do you have any employment relationship with the College of Medical Evangelists? [80]

A. No, I do not. My employment is strictly by Haystad and Jensen myself.

(Testimony of James Layton Nicholson.)

Q. Do you draw any money from the College of Medical Evangelists except through the check method which you have mentioned?

A. I am paid a yearly salary and I also get a bonus check, yes.

Q. Do you have any money invested in the College of Medical Evangelists?

A. Other than by tithes and offerings which I always give to the church as a church member.

Q. Do you know whether or not the College of Medical Evangelists is a corporation?

A. That I couldn't tell you, I couldn't tell you about that exactly. You see, it is owned by the General Conference of Seventh Day Adventists.

Q. Do you know whether the White Memorial Hospital is a corporation?

A. That I couldn't tell you either, although I know it is owned by the College of Medical Evangelists. You see, it is a foundation, and I know it comes under some kind of a foundation which is set down, but I don't know just how it is, I just couldn't say.

Q. I believe in your direct testimony you said in passing that Sam Agronovich was the one that had been assigned to hang the doors? [81]

A. That is right.

Q. And when you came there that morning around 11 o'clock, you found that he had stopped hanging doors?

A. Yes, at that time when I first arrived there, Sam wasn't there on the floor at that time. He is

(Testimony of James Layton Nicholson.)

the one that come up later. He and Saul had been putting their tools away.

Q. And you know that at that time Sam was at his bench?

A. Putting away jigs and so on, yes, and when he come up to me, he had put the jigs away and the tools away and that was in connection with the hanging of the doors. They were already put away.

Q. And your first impulse was that since Sam had been employed to hang the doors you were going to send him home; is that right?

A. That is right, and the other thing too, is, I was mad I am sorry to say, and I was going to send the carpenters home because we were practically caught up. Since then, we have added more cabinets and that has not surely been taking up the time, but most of them carpenters have been laid off on account of that.

Q. But after you calmed yourself down a bit, you instructed Mr. Steigert to assign Sam to other work; is that correct?

A. That is right, to put the butts on the jambs.

* * * * *

Q. (By Mr. Nicoson): Now, this putting the butts on the jambs—if I get in a little over my head, you must be patient. A. I surely will.

Q. As I understand it, that is in the nature, in laymen's language, of attaching the hinges to the door jambs; is that about right?

A. That is right, that is correct.

Q. So that when the hinges are there, the doors

(Testimony of James Layton Nicholson.)

can be fastened to the hinges and then they swing back and forth; is that correct?

A. We use a templet with a morticer to cut, and then all you have to do is to screw them on.

Q. And thereafter Mr. Sam Agronovich was engaged in putting on these butts on the jambs?

A. That is right.

Q. And you worked, or rather, he worked at that for how long?

A. I don't remember offhand, I think it was about three days later when we were getting caught up, because we had gone as far as we could go without hanging the doors and I had to let him go.

Q. You let Sam Agronovich, Finklestein and Levine go because the work had run out; is that correct?

A. The work ran out and at the present [83] time I had no more orders.

* * * * *

Q. (By Mr. Nicoson): On direct examination, Mr. Nicholson, you said this was a union job, did you not? A. That is right.

Q. And what do you mean by that?

A. It means that we are employing all union help on the job both carpenters and subcontractors.

Q. Does it also mean that Havstad, Mr. Havstad and Mr. Jensen or Havstad and Jensen have a contract with some union?

A. They belong to the Building Contractors Association.

Q. Well, do you know whether Mr. Havstad

(Testimony of James Layton Nicholson.)

or Mr. Jensen or Havstad and Jensen, either one of the three, have a contract with any labor union or unions?

A. Only through the Building Contractors Association as far as I know. Now, I couldn't say any other than that, but I do know they have it through the Building Contractors Association.

Q. How do you know that?

A. Because we have been in touch with the Building Contractors Association about these doors, in connection, you know, in [84] conversations with them.

Q. And is that the only way that you know that?

A. That is the only way I know, yes.

Q. And from the contact that you have had with the Building Contractors Association of Southern California Inc. that is what led you to state it was a union job?

A. That and the fact that I have to the very best of my ability run it according to the union rules, as best I possibly could.

Q. As a supervisor you did that and also as a supervisor you requested that union men be furnished to you or to the job?

A. That is right,

Q. Now, while you have been General Superintendent out there, have you had on previous occasions discussed with Mr. Fleisher certain phases of the work?

(Testimony of James Layton Nicholson.)

A. I just don't get what you mean by certain phases of the work.

Q. All right, prior to August 17, 1954, did you ever have any dealings with Mr. Fleisher?

A. Yes.

Q. That had—all right. Did any of these dealings have anything to do with the White Memorial Hospital project? A. Yes.

Q. Did they have anything to do with the people who were employed on the White Memorial Hospital project? [85]

A. Just with the men that are employed on our end of it.

Q. On your end of it? A. Yes.

Q. And in your discussion with Mr. Fleisher about these people, have you discussed with Mr. Fleisher any employees except those which are termed carpenters?

A. Any employees—not that I know of, no.

Q. So far as you know Mr. Fleisher does not represent or purport to represent anybody out there on that job except carpenters?

A. That is correct.

Q. And that has been the basis on which you have dealt?

A. That is right. In the other trades I deal with their respective business agents.

Q. And that is the basis you have dealt with him ever since he has been business agent and you

(Testimony of James Layton Nicholson.)

have been on the White Memorial Hospital job; is that right?

A. That is correct.

* * * * *

Redirect Examination

Q. (By Mr. O'Brien): Mr. Nicholson, in response to a question by Mr. Nicoson, you told us about some conversation in which Mr. Jensen asked Mr. Fleisher to send men to hang the doors. Could you give us in detail what that or how that [86] conversation went?

A. Well, yes. To start with, the day before I asked Mr. Jensen if he would telephone Mr. Fleisher and have him meet us out on the job for the specific reason of asking him if we could get men to hang the doors and if there was any way that we could work things around to where we could get this batch of particular doors hung as the job has to be completed. So he said that he would. And he called Mr. Fleisher and Mr. Fleisher came over on the job and Mr. Jensen himself asked him the question if he would be willing to send men out to hang the doors. And he said that he couldn't—well, I don't know exactly the word to say—but he said he couldn't say anything at that time at all. It is kind of hard for me to express myself.

Q. Was there anything more to the conversation than you have already told us, Mr. Nicholson?

A. That is as far as I know the full extent of it. We just asked him and explained to him the urgency of it and he gave us the statement that he couldn't say anything.

(Testimony of James Layton Nicholson.)

Q. And then in response to another question by Mr. Nicoson, my notes indicate that you testified that Nathan Fleisher told you to call Mr. Thomas?

A. That is right.

Q. Do you recall, does that recall something else to your memory now? [87]

A. Well, that was—let's see—that was on the 17th when they stopped us from hanging the doors, and it was about three days later, it was in the forenoon around 10 or 11 and again he came on the job and he told me, it was on the main floor or in the lobby, and at the same time he told me that he was reasonably sure that the doors would be released that day and that he or they was dealing back and forth between here and Wisconsin and Mr. Thomas was in a meeting and rather than to wait for him to tell Mr. Fleisher and then to have Mr. Fleisher tell us that maybe it would be better that we call direct to Mr. Thomas. So I immediately went into the telephone and called Mr. Jensen who was in the Glendale office and told him to call Mr. Thomas which he did. He wasn't able to contact him right then, but he did talk to him that evening.

Q. In any event, that was the extent of your conversation with Mr. Fleisher?

A. That is right. At that time is when I told him to send me out another door man though. He said he was reasonably sure that they would get them released and I said that that way I would have plenty of people and there was cabinets that I

(Testimony of James Layton Nicholson.)

would work him in on or whatever I had until the doors would be released because he felt reasonably sure we would be able to go ahead. So he sent out the man by the name of Allen.

Mr. O'Brien: May we have a stipulation that Earl E. Thomas is secretary-treasurer of the respondent Council? [88]

Mr. Nicoson: So stipulated.

Trial Examiner: All right, it is noted.

Mr. Nicoson: Lest the record be confusing, I am simply stipulating that E. E. Thomas is the secretary of the Council but I am not stipulating that that is the Mr. Thomas they talked about or that they talked to.

Trial Examiner: Very well.

Q. (By Mr. O'Brien): Also I believe you testified that Allen was a colored carpenter and hung the fire doors after the 17th?

A. That is right.

Q. Did anyone work with Mr. Allen in hanging those doors? A. No, he worked alone.

Q. He worked alone?

A. That is right, up to three-foot doors, is a one-man job.

Q. Now, among these doors—by the way, are there larger doors?

A. Yes, all room doors are three foot ten for the hospital beds to go through them.

Q. I think you testified on direct examination that your door-hanging operation when it was in

(Testimony of James Layton Nicholson.)

full force would be a six-man job; do you recall that?

A. That is what I had planned on, yes.

Q. Now, where would Sam Agronovich, what would his duties be on that? [89]

A. He was one of the men that was prefitting the doors with the jigs.

* * * * *

ARNOLD STEINERT

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. O'Brien): Will you please state your full name? A. Arnold Steinert.

* * * * *

Q. And may we have your address, please?

A. 1702 Orange Avenue.

Q. By whom are you employed, Mr. Steinert? [90]

A. Haystad and Jensen.

Q. And who is your immediate superior?

A. Mr. Nicholson.

Q. The same Mr. Nicholson who was just on the witness stand? A. Yes, sir.

Q. Are you a member of any labor organization? A. Yes.

Q. Of what one?

A. Local 563, Glendale.

* * * * *

(Testimony of Arnold Steinert.)

Q. The United Brotherhood of Carpenters and Joiners of America? A. That is right.

Q. And what is your position now with Haystad and Jensen, Mr. Steinert?

A. Foreman, carpenter foreman.

Q. And as carpenter foreman, what trades do you supervise? A. Carpenters.

Q. Just carpenters? A. Yes.

Q. Do you have any supervision over the laborers?

A. Well, yes, I have been telling the laborers on the last [91] job. We don't have a labor foreman so I tell 'em what to do.

Q. Did you have any labor foreman on the 17th of August of this year? A. No.

Q. Now, calling your attention to the 17th of August, Mr. Steinert, what time did you get to work that morning? A. 7:30.

Q. What was the first thing that you did?

A. Well, I don't know.

Q. In connection with your work, I mean.

A. Well, we don't go to work until 8 but I get there early. Well, I just give the men their jobs.

Q. What jobs did you assign?

A. Well, I don't know. Well, Sam Agronovich started hanging doors.

Q. Just what did he do?

A. Well, he took his jigs and plane and joiner and grouters down to the basement where he was going to start hanging the doors. And I had two men building forms in the basement.

(Testimony of Arnold Steinert.)

Q. And were they also carpenters?

A. Carpenters.

Q. Now, you had other carpenters assigned to other jobs, did you?

A. Other jobs, I don't remember what they were doing.

Q. Did you have any laborers on the job on that day? [92] A. Yes.

Q. Had you given them any duties?

A. Yes, I had 'em to move the doors from floor to floor, the doors that went on each floor we was starting scattering them from floor to floor.

Q. Sometime in the morning did you see Mr. Nathan Fleisher? A. Yes.

Q. About what time?

A. Well, it was between 10 and 11 I guess.

Q. And where was it, or where were you when you first saw him?

A. Well, I don't remember, but I think it is in the lobby of the main hospital, the new hospital.

Q. You think it was in the lobby?

A. Yes.

Q. Were there any carpenters working there in your vicinity when you first saw him?

A. No.

Q. Did you have a conversation with Mr. Fleisher? A. Yes.

Q. Was anyone else present? A. No.

Q. Were you close to the place where the Paine doors were stacked when you had this conversation? A. Yes. [93]

(Testimony of Arnold Steinert.)

Q. And what did you say to him and what did he say to you?

A. Well, he told me that we'd have to quit hanging the doors until they got it settled that they were union or non-union doors, and they were going to check on 'em and in a day or two they would be cleared and then we could go ahead and go to work.

Q. Did Mr. Nathan Fleisher use the word they all the way through there in your conversation?

A. Well, I don't remember now.

Q. Mr. Steinert, I want you to recall just as well as you can what Mr. Fleisher's words were to you?

A. Well, he said they were non-union doors, and they didn't have a label and we'd have to quit hanging the doors until it was settled.

Q. And then what did you say to him?

A. I said all right.

Q. And then what did you do?

A. Well, the laborers were moving the doors from floor to floor so I told them to leave them alone, leave 'em set and we went down into the basement where Sam Agronovich was working and told him we'd have to quit hanging the doors because they weren't union until they got it settled.

Q. Did you tell Mr. Agronovich to do anything else?

A. I told him he could put his tools away and then he could put on the door butts on the metal jambs. [94]

(Testimony of Arnold Steinert.)

Q. That was at the same time? A. Yes.

Q. And Mr. Fleisher was present when you talked to Mr. Agronovich? A. Yes.

Q. When you told the laborers to stop moving the doors, did you give them any other duties?

A. I don't think so, no.

Q. And then what did you do?

A. Well, I went on with my work, I mean, going around to check the other carpenters.

Q. Did you go into the office any time that morning? A. No.

Q. When did you first see the superintendent, Mr. Nicholson?

A. I don't know, I guess it was around 11 or a little after 11 o'clock.

Q. How long after you had given these instructions to the carpenters and to the laborers was it that you first saw Mr. Nicholson?

A. Well, I'd say it was about a half hour.

Q. Do you recall asking some questions of certain carpenters on the day after you testified in Federal Court? A. Talking to other carpenters?

Q. Yes, talking to several carpenters on the job, yes. A. Yes, sir. [95].

Q. Who did you speak to first?

A. Saul Agronovich.

Q. What did you say to Saul and what did he say to you?

A. I told him that I was asked to go around and ask the men if they would hang the doors and so I am coming to him as being the steward on the

(Testimony of Arnold Steinert.)

job and what he thought I should do, whether I should or whether I shouldn't because I didn't want to get in trouble with nobody, and if he thought that I shouldn't, I wouldn't go around and ask 'em. And he said, well, that if the Court asked us to go round, well, then, he didn't see that it would be anything wrong with it. So I did.

Q. Tell us, as well as you recall, who you spoke to and what each carpenter said.

A. Well, I asked Saul, then I turned around and I said, well, would you hang, would you hang the doors, and he said no.

Q. Next?

A. Then I asked Lou Feldman which was working there with him, and he said no, that he wouldn't hang them either unless they were released. So then I went to ask Charlie Franklin and I asked him that, if he would hang the doors, and said no, not unless they were released so they could be hung. And then I went and asked Mr. Shand and he said yes, he would, but he was afraid to or something, I don't know, it was something on the idea. So I talked to Mr. Lokna and asked him if he would hang the doors and he said no, that he [96] couldn't, that they would just have to wait until they got settled.

* * * * *

Cross Examination

Q. (By Mr. Nicoson): When you went to stop Sam Agronovich from hanging the doors, did Mr.

(Testimony of Arnold Steinert.)

Fleisher say anything? To Sam?

Q. Yes. A. Not that I know of, no.

* * * * *

JAMES C. BARRON

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. O'Brien): State your name, please, sir. A. James C. Barron. B-a-r-r-o-n.

Q. And your address, sir?

A. My business address?

Q. Yes, sir. [97]

A. 1049 Slauson Avenue, Los Angeles 11.

Q. What is your connection with Sand Door and Plywood Company?

A. I am vice-president and general manager.

Q. How long have you held that position?

A. Three years.

Q. How long have you been associated with the company?

A. I have been with them four years July 15th of this year.

Q. As vice-president and general manager, are you familiar with the general nature of the business? A. I am, sir.

Q. What is the business of Sand Door and Plywood Company?

A. We are wholesale jobbers of plywood doors and allied building materials.

(Testimony of James C. Barron.)

Q. Wholesale jobbers, do you have the exclusive agency with Paine Lumber Company?

A. Yes.

* * * * *

The Witness: That is one of the firms that we represent. One of the firms that we represent exclusively is the Paine Lumber Company Ltd. of Oshkosh, Wisconsin.

Q. Do you have a franchise from Paine Lumber Company, a contract? [98]

A. We have a written agreement with the Paine Lumber Company to represent them exclusively.

* * * * *

Q. (By Mr. O'Brien): Do you have a copy of the contract? A. Yes.

* * * * *

Q. Does that contract give you exclusive jurisdiction over any particular territory? [99]

* * * * *

Trial Examiner: I will overrule the objection.

The Witness: Exclusive distributors for the Southern California territory.

Q. (By Mr. O'Brien): And that takes in what territory, sir?

Mr. Nicoson: May I have a running objection, Mr. Examiner?

Trial Examiner: Yes, I will let him testify as to the content of this document on the understanding that the document will be produced in the hearing room tomorrow morning for the inspection of

(Testimony of James C. Barron.)

counsel, and for that reason, I will overrule the objection to any such testimony.

Mr. Nicoson: And may the objection run to this entire line of testimony?

Trial Examiner: Yes, it may.

The Witness: Although I am not sure whether the agreement specifically says so as to the limits of the territory, it is generally assumed to mean from Fresno south.

Q. (By Mr. O'Brien): Does Sand, Door and Plywood Company have employees represented by any labor organization? [100]

A. We do.

Q. What employees are represented by what organizations?

A. Our warehousemen are represented by the A. F. of L. Brotherhood of Warehousemen and the local is No. 2288.

Q. And that is a teamster local?

A. No, that is a lumber and sawmill workers union.

Q. Lumber and sawmill workers?

A. Yes. And we also have contracts in our Los Angeles warehouse with Local 420 of the Teamsters Union, A. F. of L. And in San Bernardino we have a contract with the A. F. of L. Teamsters Union, and I believe the number is 465. Mr. Nicholson would probably know that.

Q. Is the lumber and sawmill workers union associated with the Brotherhood of Carpenters and Joiners of America?

(Testimony of James C. Barron.)

Mr. Nicoson: We will stipulate it is.

Mr. O'Brien: Thank you.

Q. (By Mr. O'Brien): As vice-president and general manager, did you cause anyone under your supervision to collect invoices and bills of lading showing the shipment of goods from Paine Lumber Company to yourself and the amounts that you paid for each shipment? A. Yes, I did.

Mr. O'Brien: Now, Mr. Examiner, these documents that I have here; two booklets, one is identified as Petitioner's Exhibit No. 4 in the U. S. District Court and the other is [101] identified as Petitioner's Exhibit 5 in the U. S. District Court, and these exhibits have been released to my custody by order of the U. S. District Judge Harry C. Westover for use in this proceeding. That is only until the Trial Examiner closes this proceeding. They are here now for the examination of opposing counsel. I would like to interrogate the witness about them. [102]

Mr. Nicoson: I offer to stipulate that the documents which Mr. O'Brien now holds in his hand, being Exhibits 4 and 5 in evidence in the matter pending before Judge Westover in the United States District Court of Southern California, show that in the year of 1953, the calendar year of 1953, Sand Door and Plywood Company received from the Paine Lumber Company Ltd., Oshkosh, Wisconsin, materials, including doors, in the sum of $185,796.84. And for the year of 1954, from January 1st up to and including September 8, 1954, Sand Door and

(Testimony of James C. Barron.)

Plywood Company received from Paine Lumber Company Ltd., Oshkosh, Wisconsin, materials, including doors, in the sum of $103,503.05. And that the invoices from which these figures were taken are included in Exhibits 4 and 5 in the U. S. District Court.

Mr. O'Brien: General Counsel will so stipulate.

Mr. LeBaron: So stipulated by the company.

Trial Examiner: The stipulation is noted.

Mr. O'Brien: And may it further be stipulated that these [103] figures represent goods shipped directly from Oshkosh, Wisconsin to various points in the State of California.

Mr. Nicoson: Is that a fact?

The Witness: Yes.

Mr. Nicoson: I will so stipulate.

Mr. O'Brien: So stipulated.

Mr. LeBaron: So stipulated.

Trial Examiner: Again, the stipulation is noted.

Q. (By Mr. O'Brien): Calling your attention to the 17th of August or before that time, do you remember or do your records indicate whether doors were obtained from Paine Lumber Company for use on the White Memorial Hospital project of the Medical College of—I'm sorry, of the College of Medical Evangelists?

Mr. Nicoson: Let the question be answered yes or no.

The Witness: Yes.

Q. (By Mr. O'Brien): And were those doors received from Paine Lumber Company?

(Testimony of James C. Barron.)

A. They were.

* * * * *

Q. (By Mr. O'Brien): By looking at the invoices in the set [104] which is Petitioner's Exhibit No. 5 in the U. S. District Court, could you tell us when the doors were received in California?

A. Yes. Those doors were received——.

Mr. Nicoson: Just a moment—all right.

Q. (By Mr. O'Brien): I show you an invoice on the letterhead of Paine Lumber Company, Ltd. addressed to Sand Door and Plywood Company and under description indicating the White Memorial Hospital—there are several pages there—approximately when were those doors received?

A. Those doors were received between the 10th and the 14th of August, 1954.

Q. And upon receipt of those doors, what was the first thing that you did?

A. We unloaded the doors from the car.

Q. Did you notify anyone of their arrival?

A. Yes, we notified the firm of Watson & Dreps to whom we sold the doors and had taken an order for.

Q. And what is the business of Watson & Dreps?

Mr. Nicoson: Just a moment, objected to as no proper foundation having been laid.

Trial Examiner: Do you know what their business is?

The Witness: Yes.

Trial Examiner: I will overrule it.

The Witness: They are mill work contractors.

(Testimony of James C. Barron.)

Q. (By Mr. O'Brien): Did you subsequently deliver these doors to Watson & Dreps?

A. They took delivery at our warehouse beginning the 14th of August and completed the morning of the 17th of August.

Q. The 17th of August. And did you receive word of any difficulty with regard to these doors from anyone?

Mr. Nicoson: Let that be answered yes or no.

The Witness: Yes.

Q. (By Mr. O'Brien): Approximately what time in the day?

A. It was in the forenoon or just before noon I believe, I would say around 11:45.

Q. Did the word come to you in person or by telephone or by letter? A. By telephone.

Q. From whom? A. Mr. Dreps.

Q. And who is Mr. Dreps?

A. Mr. Dreps is a partner in the firm of Watson & Dreps.

Q. And what did Mr. Dreps say to you?

Mr. Nicoson: Objected to on the grounds that it is hearsay.

Trial Examiner: Again we are in the situation that whatever Mr. Dreps may have said to the witness may not constitute evidence of the truth of what he said.

Mr. O'Brien: That is true, Mr. Examiner, I just want to [106] develop this chronologically.

Trial Examiner: With that observation, I will overrule the objection. You may tell us what he said.

(Testimony of James C. Barron.)

The Witness: Mr. Dreps told me he had been advised by Mr. Jensen of the contracting firm of Havstad and Jensen that the carpenters on the job had refused to hang the doors because the doors did not have a union label.

Q. (By Mr. O'Brien): And then, what did you do?

Mr. Nicoson: May I now move to strike the answer on the grounds that it now appears to be hearsay twice removed.

Trial Examiner: Well, if it has any hearsay with respect to that we will of course, or it will, of course, not be used as evidence. It does have the appearance of hearsay according to these representations by Mr. Dreps. What is the purpose of bringing this in? [107]

* * * * *

Q. (By Mr. O'Brien): What did you do next?

A. I told Mr. Dreps that I would look into the matter.

Mr. Nicoson: I am going to object to what he told Mr. Dreps as hearsay.

Mr. O'Brien: I don't care about that.

Q. (By Mr. O'Brien): What did you do next?

A. I called the Los Angeles County District Council of Carpenters to get in touch with a Mr. Cordil.

Mr. O'Brien: May we stipulate that, Mr. Nicoson, that Nick Cordil is the business representative on the Los Angeles District Council of Carpenters

(Testimony of James C. Barron.)

and Joiners of America and also president of Local 2288?

Mr. Nicoson: So stipulated.

Mr. O'Brien: Thank you.

Q. (By Mr. O'Brien): Did you speak to Mr. Cordil? A. I did.

Q. How long have you known Mr. Cordil?

A. Two years.

Q. What was your conversation with Mr. Cordil?

Mr. Nicoson: Objected to on the grounds that it calls for hearsay.

Trial Examiner: I will overrule the objection.

The Witness: I told Mr. Cordil of our trouble and asked him if he could help us out. His reply was that he was not familiar with the case in question and suggested that I call [108] Mr. Earl Thomas of the Los Angeles County District Council of Carpenters to get further information which I proceeded to do. Shall I go on?

Q. (By Mr. O'Brien): Now, in there anywhere, did you call the office of Havstad and Jensen?

A. Yes.

Q. Where did that fit in?

A. It fitted in between the call that I received from Mr. Dreps and the time that I was able to reach Mr. Cordil at the Council.

Q. Now, who did you talk to at Havstad and Jensen? A. Mr. Jensen.

Q. Did you talk to anyone else?

A. It is quite possible—I believe that Mr. Nichol

(Testimony of James C. Barron.)

son came on the telephone during the lengthy conversation we had.

Q. Did you talk to Mr. Fleisher?

A. Not the first time, but there were several subsequent conversations with Mr. Jensen since he asked to be informed of what we had found out through our efforts with the District Council and during one of those conversations.

Q. I just want to get the sequence here. First of all, you had this telephone call from Mr. Dreps and the next thing you did was to try to reach Mr. Cordil; is that correct?

A. No, I called Mr. Jensen before I called Mr. Cordil. [109]

* * * * *

Q. (By Mr. O'Brien): Did you finally talk to Mr. Thomas? A. Yes, I did.

Q. About what time?

A. About 4 o'clock on the 17th.

Q. And what was your conversation with him?

A. I asked Mr. Thomas, well, first I identified myself, and I told him of my conversation with Mr. Cordil and asked him what the story was regarding the hanging of the doors in the White Memorial Hospital. Mr. Thomas replied that he had just been given the information and he wasn't too familiar with it, but that it was his intention to get in touch with the local union in the immediate area of the Paine Lumber Company in Wisconsin to find out if the doors were union-made doors.

Q. Is that the extent of that conversation?

(Testimony of James C. Barron.)

A. Yes, that is the extent of it, and he said he would advise me, the only thing he said was that he would advise me as soon as he heard from the union as to whether they were [110] union-made doors.

Q. Did you have any further conversation with Mr. Thomas? A. I did.

Q. When?

A. The next day about the same time, it was around 3:30 or 4 o'clock in the afternoon that I called him.

Q. And what was that conversation?

A. I called him to find out and Mr. Thomas advised me that he had received a telegram from the secretary of the local of the Fox River Valley Council of Carpenters in Appleton, Wisconsin, who he said had jurisdiction in that area. And that, well, he read the telegram over the telephone to me, and it said that the doors were not union made and that Paine Lumber Company did not belong to any union. I replied to him that—well, what are we going to do here, because the doors are here, and we are an innocent bystander. We are union and Watson & Dreps are union and the contractors are union, even the people that hauled the doors out here on the train were union people. He said well, that under the circumstances we can't hang non-union doors, but he said to me, why don't you buy union doors? And I said well, that would be impossible. And he asked me why and I went into some lengths to explain to him why.

Q. What did you say to him?

(Testimony of James C. Barron.)

A. I said to him that in the Los Angeles area there are four doors generally specified for institutional work, all of whom [111] we are unable to buy from. And he asked why, and I went into detail, and this is it.

Q. Just tell me what you said to Mr. Thomas.

A. I told him that the four doors were in order, the Rottis door, made by the Rottis Plywood Corporation of Marshfield, Wisconsin, the Hardwood Products door, made in Neenah, Wisconsin, and the U. S. Plywood door, made in Algonah, Wisconsin. And the Rottis Company maintains a warehouse in Los Angeles, stocks their own doors and sells to the same accounts we do. The Hardwood Products Corporation has a factory representative here who sells direct to the accounts that we sell to, and the U. S. Plywood Corporation also maintains a warehouse here and sells direct to the accounts that we do. The only other firm that we could therefore buy from that makes this type of door is the Paine Lumber Company Ltd. of Oshkosh, Wisconsin. His reply was that that was, or that had nothing to do with it, that they could not do anything about it. And I asked him what about the jobs, the institutional jobs that we had back at the mill in production, the stock orders that we had back there, the stock in our warehouse and the stock on the way. And he suggested that if I would give him a list of institutional jobs that were in production at the Paine Lumber Company, he would go before his board and see whether he could get clearance for the hanging of those doors

(Testimony of James C. Barron.)

when and if they arrived in Los Angeles. I then asked him what about the stock [112] on the floor, and he immediately replied that he would see what he could do about those too, at the same time when he went before the board. I then asked him about the stock orders that were in production back at the mill, and he suggested that I had better cancel them and order no further doors from the Paine Lumber Company. That was the extent of the conversation.

Q. Have you had any further conversation with Mr. Thomas? A. None since that day.

Q. Were you present on or about October 5 when Mr. Sand talked to Mr. Nicholson on the telephone?

A. I was.

Q. Did you hear Mr. Sand's end of the conversation? A. I did.

Q. Was anyone else present besides you and Mr. Sand? A. Only Mr. Sand and myself.

Q. What do you recall that Mr. Sand said?

Mr. Nicoson: Objected to as hearsay.

Mr. O'Brien: That was something that Mr. Nicholson went into, I don't know why. There is testimony from Mr. Nicholson as to what he understood Mr. Sand to say. Again, I don't know why Mr. Nicholson wanted to go into it, but let's find out what this witness knows.

Mr. Nicoson: It does not relieve it from being hearsay as between this gentleman and Mr. Sand.

Trial Examiner: Well, now, this is something which the [113] witness heard with his own ears.

(Testimony of James C. Barron.)

Mr. O'Brien: It is not hearsay, it is a question of whether it is relevant or material.

Trial Examiner: Well, why are we concerned with it? Did you say Mr. Nicholson or Mr. Nicoson?

Mr. O'Brien: Mr. Nicoson brought it in through Mr. Nicholson and since he opened it up, I thought we might as well get the whole story.

Trial Examiner: Well, I will let you go ahead and will overrule the objection, but I have no recollection of that.

Mr. Nicoson: And just for the record, may I also object to it on the grounds that it is immaterial.

Trial Examiner: It may be, we will see, but I will let it in at the present time.

The Witness: Mr. Sand told Mr. Nicholson that in the previous day's testimony in the Federal District Court before Judge Westover that the Judge had said just before recessing the Court for the day that he wanted the union and the contractor to get together and hang the doors, find some way to hang the doors. And Mr. Sand thought it would be a good idea for Mr. Nicholson to ask them to hang the doors since the Court had specifically asked them to do that, that was the gist of the conversation.

Q. (By Mr. O'Brien): I think you said that you had at least one telephone conversation with Mr. Fleisher; do you remember [114] where that fits in now?

A. Yes, well, I don't recall whether it was on the 17th or 18th, but it was almost immediately after I

(Testimony of James C. Barron.)

had heard about the case in question that the doors were not being hung.

Q. Well, as you recall, what did you say to him and what did he say to you?

A. Mr. Fleisher was put on the telephone, since I had been talking to Mr. Jensen, and Mr. Fleisher happened to be in the office and they put him on the telephone and he asked me where the doors were manufactured, what was the name of the company that manufactured them, and I gave him that information over the telephone. And, while he was on the telephone, I asked him what was the trouble, and he said that the doors don't have a union label, and they have to be cleared before I can permit them to be hung.

* * * * *

Cross Examination

Q. (By Mr. Nicoson): You say that this was a conversation that you had with Mr. Fleisher following one that you were having with Mr. Jensen?

A. It was in the same telephone conversation, he was put on the telephone, yes.

Q. Well, now, do you understand, or do I understand you to say that Mr. Jensen was also on the telephone at the time you [115] were talking to Mr. Fleisher?

A. No, that is incorrect.

Q. Then, as far as you know, you and Mr. Fleisher were the only ones that had telephones to your ears? A. That is right.

Q. Now, when he asked you about the manufacturing of the doors, what did you tell him?

(Testimony of James C. Barron.)

A. The manufacturing of the doors, I told him where the doors were manufactured and the name of the company that manufactured them.

Q. What did you tell him, that is what I am asking?

A. I told him the doors were manufactured by the Paine Lumber Company Ltd., of Oshkosh, Wisconsin, and I spelled it for him.

Q. And that was on the 17th of August?

A. I believe that was on the 17th.

Q. That was when it was, at least as far as you now recall? A. As far as I now recall.

Q. The day on which the difficulty about the doors arose? A. Arose?

Q. At least that is the date you first received information about it? A. That is correct.

Q. Now, in this telephone call, did you originate it, or did Mr. Jensen originate it? [116]

A. It is my recollection that Mr. Jensen originated that telephone call.

Q. And when he called you, I take it that you were at your office at the Sand Door and Plywood Company? A. I was.

Q. And what did he first say to you, as best you now recall?

A. He said that the carpenters, that Mr. Fleisher, as their business agent refused to hang the doors.

Q. What else?

A. And that he wondered what could be done to get the doors hung, and it was just at that point that Mr. Fleisher evidently asked to talk to me to find out

(Testimony of James C. Barron.)

where the doors were manufactured and by whom?

Q. Then when he told you, did he tell you also at the same time that the doors didn't have a union label on them? A. That is right.

Q. Is that about the full extent of your talk with Mr. Fleisher and Mr. Jensen on that occasion?

A. Yes.

Q. Now, you said in your testimony a moment ago that you overheard Mr. Sand's conversation with Mr. Jensen over the telephone; is that right?

A. Yes.

Q. And had you talked with Mr. Sand about this before you put in the call to Mr. Jensen? [117]

A. The conversation with whom?

* * * * *

Q. (By Mr. O'Brien): Do you recall the telephone conversation that Mr. Sand had with Mr. Nicholson? A. I do.

Q. Before Mr. Sand had that conversation, had you and Mr. Sand discussed what he was going to talk to Mr. Nicholson about?

A. No. [118]

Q. Had you been with Mr. Sand when he received some sort of information or report with respect to what went on down at the Court?

A. Yes.

* * * * *

Q. Now, you also have stated that you bought some doors from Paine Lumber Company for the White Memorial Hospital; is that correct?

A. Yes.

(Testimony of James C. Barron.)

Q. Now, can you take these invoices and tell us just how much those doors were invoiced out at?

A. I sure can.

Q. Will you please do that?

A. Yes. Evidently the final amount has not been carried forward here on their invoice.

Trial Examiner: Give us the separate amounts then.

The Witness: Well, there is $750. $4,275.34.

Mr. Nicoson: Four thousand and what?

The Witness: $4,275.34. And there is $825. $1275.75. $45. That seems to be the extent of it.

Mr. Nicoson: Did you take off those figures as you went through?

The Witness: Yes.

Mr. Nicoson: I mean, are you now in a position to add them up to see if my total is correct?

The Witness: Oh, no, I didn't, I am sorry. I will do it. I get a total of $7,171.09.

Mr. Nicoson: Thank you, sir, so do I.

Q. (By Mr. O'Brien): Now, those amounts represent doors which you obtained from the Paine Lumber Company for the White Memorial Hospital job; is that correct? A. That is right.

Q. And those were all transactions within the year 1954? A. That is correct.

Q. Were there any such transactions in the year 1953?

A. With respect to the White Memorial Hospital? [120]

Q. Yes. A. No.

(Testimony of James C. Barron.)

Q. You talked with Mr. Thomas and he asked you to give him a list of the institutional jobs so that he could go before the Council or the Board to see if he could get any clearance; is that your testimony, sir? A. That is right.

Q. Did you give Mr. Thomas such a list?

A. I did not. [121]

* * * * *

Mr. O'Brien: Mr. Nicoson has handed to me the constitution and laws of the United Brotherhood of Carpenters and Joiners of America, the constitution as amended January 1, 1954. And I would like to inquire of Mr. Nicoson whether or not the constitution that I now have was in effect in August of 1954 and presently in effect.

Mr. Nicoson: I understand that that is right. I so understand that to be right.

Mr. O'Brien: I will ask the Reporter to mark this as General Counsel's Exhibit No. 3.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 3 for identification.)

Mr. O'Brien: I will now offer that in evidence.

Trial Examiner: Hearing no objection to General Counsel's Exhibit No. 3, it is admitted.

(Thereupon, the document heretofore marked General Counsel's Exhibit No. 3 for identification was received in evidence.)

[See pages 200-201.]

Mr. O'Brien: I will call Mr. Jensen.

EMMETT R. JENSEN

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination [124]

Q. (By Mr. O'Brien): State your full name, please, sir? A. Emmett R. Jensen.

Q. Your business address, sir?

A. 312 North Boyle; that is the mailing address. And the office address is 1721 New Jersey.

Q. And the business address is 1721 New Jersey; is that correct? A. That is right.

Q. And the first address, that is the address of what?

A. That is the address of the White Memorial Hospital business office.

Q. And what is your business, sir?

A. General contractor.

Q. Are you licensed by the State of California?

A. Yes, sir.

Q. As an individual? A. Yes, sir.

Q. How long have you had that license approximately?

A. Well, I believe since about 1935 or 1936. No, I think before that—maybe it was 1933 or 1934; I do not remember exactly.

Q. Are you associated with anyone else in the construction business in connection particularly with the White Memorial Hospital job?

A. Yes, sir. [125]

Q. With whom?

(Testimony of Emmett R. Jensen.)

A. Mr. Larry C. Havstad.

Q. What is the nature of the business relationship with Mr. Havstad?

A. It is a joint venture.

Q. A joint venture solely for the construction of the hospital building, is that correct?

A. Or any other building on the campus.

Q. When was the joint venture formed, approximately?

A. I believe it was in 1952, in July, I believe, of 1952.

Q. Is it contemplated that the joint venture will be dissolved when this building project is completed? A. I imagine so.

Q. Are you a member of any organization of the general contractors? A. Yes.

Q. Of what organization?

A. Building Contractors Association.

Q. The Building Contractors Association, Inc.?

A. I think that is right.

Q. How long have you been a member approximately?

A. Just about ever since I had a contractor's license. I think probably within a year of that time or after that time.

Q. With reference to the hospital doors, what was the first notice that you had of any difficulty with those doors? [126]

A. When Mr. Nicholson, the superintendent, called me in Glendale and told me they were having trouble with the doors.

(Testimony of Emmett R. Jensen.)

Q. Do you recall when that was?

A. Well, I think that was the 17th of August.

Q. What action did you take?

A. I called Mr. Phillips of the Building Trades Council.

Q. Mr. Phillips?

A. Yes, Mr. R. N. Phillips.

Mr. O'Brien: May we stipulate that R. N. Phillips is a business representative of the Los Angeles District Council of Carpenters?

Mr. Nicoson: We can, but the witness just said that he called Mr. Phillips a member of the Building Trades Council.

Mr. O'Brien: I will have him identified further, but I just want this particular man identified if counsel will so stipulate.

Mr. Nicoson: I will stipulate to what you ask me but that is not the man which the witness has identified yet.

Trial Examiner: Well, the stipulation is to the office of Mr. Phillips in the Carpenters Council, is that not right?

Mr. Nicoson: He is a business agent and I will stipulate to that.

Q. (By Mr. O'Brien): How long have you known Mr. Phillips?

A. My business has been in Glendale ever since I have been in the building business, mostly in Glendale, and Mr. Phillips [127] was the business agent in Glendale.

(Testimony of Emmett R. Jensen.)

Mr. Nicoson: Your Honor, I am sorry, but I am going to have to object to this type of answer.

Trial Examiner: I will sustain it. The question is how long have you known Mr. Phillips.

The Witness: I will say six years.

Q. (By Mr. O'Brien): Have you had business dealings with him in that time?

A. Oh, yes; sure.

Q. In what capacity?

A. As the business agent for the carpenters' local there in Glendale.

Q. Thank you.

Now, what was your conversation with Mr. Phillips?

A. Well, I said to him that we were in trouble about the doors, and I asked, or rather he asked what was the trouble. I told him what kind of doors they were and he said that he thought that those doors were all right. But he said: "However, I will give you a man that you can call, a Mr. Knight," I don't remember if he gave me the phone number or whether he had me transferred to this Mr. Knight.

However, I did talk to Mr. Knight.

Q. Did you talk to Mr. Knight that same day?

A. Yes.

Q. And had you ever heard of Mr. Knight before? [128]

A. No.

Q. Now, later that same week, did you have a talk with Mr. Thomas?

A. I can't say whether it was the same week or whether it was in the first part of the following week

(Testimony of Emmett R. Jensen.)

because I don't remember exactly, but I did have a talk with him.

Q. And did you call Mr. Thomas?

A. I called Mr. Thomas. [129]

* * * * *

Q. (By Mr. O'Brien): What was your conversation with Mr. Thomas?

A. Well, I asked him what had happened and that I was told to call him.

Trial Examiner: Just tell us what passed between you?

The Witness: That was——

Mr. O'Brien: I believe that that was what the witness was doing or attempting to do, Mr. Examiner.

Trial Examiner: Well, I don't think so. Go ahead.

The Witness: I asked him had he heard about the doors yet, had he gotten any report. And he told me he was going to get a report from back East and I asked him if he had gotten that report and he said yes, that they had gotten a message from the local back there—I forgot the name of the town—but he said they had inquired about them and had found out that the Paine Lumber Co. was not a union operation.

Q. (By Mr. O'Brien): Was there any more to the conversation?

A. He said that the carpenters would not be able to handle those doors.

Q. Is that all there was to the conversation?

A. Yes, sir.

(Testimony of Emmett R. Jensen.)

Q. Have you met Mr. Nathan Fleisher?.

A. Oh, yes.

Q. Have you had any conversation with Mr. Fleisher relative to these doors? [130]

A. Well, I did the other day. Yes, just recently—about two or three days ago.

Q. Where did you have that conversation?

A. Over the—well, over on the White Memorial Hospital job.

Q. And who was present?

A. Mr. Nicholson.

Q. Mr. Nicholson and Mr. Fleisher and yourself. Was there anyone else present?

A. Well, the man in the office there, Mr. Harry Kress, the secretary in the office.

Q. And what was the conversation?

A. Well, I asked Mr. Fleisher if it would be possible for us to some way work out a deal whereby we could get these doors hung, and he said, well, that this is in trial and let's not even talk about it. And we talked quite a bit but we couldn't talk about working out any kind of a deal whereby we could hang the doors.

Q. I want you to just tell us, if you can, I know it is difficult to reconstruct these things, but if you can, will you please tell us just what was said and try to put yourself back into the same position where you were and tell us what you said and what Mr. Nicholson said and what Mr. Fleisher said, we just want the conversation and want to know what the conversation was. [131]

(Testimony of Emmett R. Jensen.)

A. We kept talking back and forth and I kept asking him if there wasn't some way that he thought that we could get together with the District Council down here and, in some way, work out terms to get these doors hung. And Mr. Fleisher said that he couldn't talk about it and we tried to approach it, we tried to approach the subject in several ways, but Mr. Fleisher said: I just can't talk about it.

* * * * *

Q. (By Mr. O'Brien): I know it is very difficult, sir, but what I am asking you——

Imagine that I am Mr. Fleisher and you put the questions to me and then imagine that you are Mr. Jensen.

A. Well, I kept asking if there wasn't some way, if there wasn't some way he could figure out so we could work out a deal whereby we could get the doors released so they could be [132] hung. He said: "I am sorry, Mr. Jensen; I can't even talk about it and that is that."

Mr. O'Brien: That is all. Thank you.

Cross Examination

Q. (By Mr. Nicoson): Mr. Jensen, how long did you say you had been a member of the Building Contractors Association of Southern California?

A. Well, I would say,—well, I don't remember the exact date, but it was probably in 1934 or 1935, anyway, about a year after I got my contractor's license.

(Testimony of Emmett R. Jensen.)

Q. Can you tell us a little bit about the Building Contractors Association?

A. Well, it consists of a group of general contractors here in the Los Angeles area, or I would say in the Los Angeles County area, but this particular chapter that I belong to is the Glendale-Burbank chapter.

Q. Now, in the period of time that you have been a member of the Building Contractors Association, which is, I think, in ordinary parlance of the trade, referred to as the BCA—am I correct in that?

A. That is right.

Q. Now, in your relationship with that organization, have you ever had occasion to sign a card which bound you to recognize and be governed by any labor contract that the BCA had negotiated in your behalf? Do you understand the question? [133]

A. You mean like the labor agreement?

Q. Yes. A. Yes.

Q. And, since 1933 or 1934—I think that is the date that you have at least tentatively given—since that time, when you became a member of BCA—am I right about that date? A. That is right.

Q. Is it not a fact that the BCA has negotiated for you and on your behalf labor contracts with labor unions governing your operation as a general contractor? A. That is right.

Q. And you have, through all of that period of time, been governed by those contracts of the BCA and the labor unions? A. That is right.

(Testimony of Emmett R. Jensen.)

Q. And are you at present a member of the BCA? A. Yes.

Q. Are you aware that the BCA carried on negotiations in the summer which resulted in a new contract? A. Yes, sir.

Q. Have you seen the new contract?

A. Yes.

Q. And have you had a copy of it?

A. Yes.

Mr. Nicoson: I would like to have this marked as Respondent's Exhibit No. 1. [134]

(Thereupon, the document above referred to was marked Respondent's Exhibit No. 1 for identification.)

Q. (By Mr. Nicoson): Mr. Jensen, I hand you a document which, for the purpose of identification, has been marked as Respondent's Exhibit No. 1, and I will ask you to examine it and state if that is not a copy of a printed contract, or rather if that is not a printed copy of a contract which BCA and certain labor organizations negotiated effective as of May 1, 1954?

A. I believe it is. I have not read all of it, but I believe it is.

Q. And, after it was negotiated, you attended a meeting of the BCA during which meeting the terms and provisions of the contract were explained to you, is that correct?

A. Well, I didn't happen to attend the meeting.

Q. But there was such a meeting, is that right?

A. That is right.

(Testimony of Emmett R. Jensen.)

Q. And you were furnished by the BCA with a contract which is, so far as you can tell, identical to the one that you have before you?

A. I think so.

Q. And you know that to be the contract which is, in effect, between the BCA and certain labor organizations on your behalf?

A. That is right. [135]

Mr. Nicoson: I will offer that in evidence.

Mr. O'Brien: No objection.

Mr. LeBaron: No objection.

Trial Examiner: There being no objection, it will be received in evidence.

(Thereupon, the document heretofore marked Respondent's Exhibit No. 1 for identification was received in evidence.)

[See pages 201-204.]

Q. (By Mr. Nicoson): Mr. Jensen, do you have anything to do with the operation of the construction of the White Memorial Hospital?

A. Yes, sir.

Q. Mr. Nicholson who testified yesterday, stated that he was the general superintendent out there. Now, is that right? A. That is right.

Q. And I take it that the—you will correct me if I am wrong—that you are the one, for want of a better word, the superior officer over Mr. Nicholson, is that correct? A. Yes.

Q. In other words, he is responsible to you?

A. That is right.

(Testimony of Emmett R. Jensen.)

Q. And, in case he needs any orders, he gets them from you, does he? A. That is right.

Q. And he gets his instructions from you; is that correct? A. I guess so. [136]

* * * * *

EMMETT R. JENSEN

a witness recalled by and on behalf of the General Counsel, having been previously duly sworn, was examined and testified further as follows:

Cross Examination—(Continued)

Q. (By Mr. Nicoson): You are the same Mr. Jensen who previously [137] testified, are you not?

A. Yes, sir.

Q. I show you again Respondent's Exhibit No. 1 in evidence which you have identified as the master labor contract. I will ask you whether or not insofar as your labor relations on the White Memorial Hospital and the buildings for the College of Medical Evangelists is concerned, was that operation operated under that contract on or about the 17th of August, 1954?

A. As a member of the Building Contractors Association, I naturally accept their negotiations.

Q. And this was the contract that you were operating your general contracting business under on August 17, and is it the contract that you have been operating under ever since?

A. Well, that is the only contract that there is.

Q. Then you are giving me a yes answer, are you? A. Yes. * * * * *

Mr. Nicoson: Yesterday, your Honor, in my questions to Mr. Baron, we developed some figures with respect to the amount of goods purchased from the Paine Lumber Company which was $7,171.09. On further reflection and mathematical calculation, [138] we now find that the figure should be $9,148.32 and I offer to stipulate that figure in place and instead of the $7,171.09.

Trial Examiner: Is that agreeable?

Mr. O'Brien: General Counsel will so stipulate.

Trial Examiner: The stipulation is accepted and noted. [139]

* * * * *

GENERAL COUNSEL'S EXHIBIT No. 2

By-Laws and Trade Rules
District Council of Carpenters

Name

Section 1—This body shall be known as the Los Angeles County District Council of Carpenters and shall be composed of regularly elected delegates from all Local Unions of the United Brotherhood of Carpenters & Joiners of America, located in Los Angeles County. It shall have such powers as are specified under the Constitution and General By-Laws of said U. B. of C. and J. of A. and these By-Laws.

* * * * *

Instruction to Members

Section 16—

* * * * *

(b)—It shall be the duty of every member who knows of any member violating any of the by-laws, or trade rules to prefer charges in the District Council against this member.

* * * * *

(d)—Only members of the United Brotherhood of Carpenters and Joiners of America shall be permitted to do carpenter work on any job. No member shall use, handle, install or erect any material produced or manufactured from wood that is not produced and manufactured by members of the United Brotherhood of Carpenters and Joiners of America.

* * * * *

(g)—All Carpenter Foremen must be members of the United Brotherhood of Carpenters and Joiners of America; no Foreman shall hire non-union carpenters.

* * * * *

Foremen

Section 20 (a)—All carpentry foremen must be members of the United Brotherhood of Carpenters and Joiners of America. No foreman shall hire non-union carpenters.

* * * * *

(f)—All foremen are to be held equally responsible (the same as the Steward) for the enforcement of all By-Laws and Trade Rules of the District Council. Violators of this paragraph shall be subject to a fine of $100.00 and/or expulsion.

* * * * *

Affiliated Local Unions and Representatives

* * * * *

The Oaks-Mint Canyon

Clybourn-Sunland Ave. 64-Pasa. City Limits
Local No. 563
Citrus 3-2080 - Chapman 5-4521

Arthur H. March & Earl M. Galpin, Bus. Rep.
L. A. Wilson, Rec. Secy.
Wm. J. Seymour, Fin. Secy.
Office 105 W. Chevy Chase, Glendale
Meets Fridays
Los Feliz-Riverside Dr.-Arroyo Seco

* * * * *

Mission and Valley Blvd.

Mission-Eastern Ave. Indiana-Coyote Pass
Local No. 1976
Angelus 1-5767

Nathan Fleisher, Bus. Rep.
Cecil Dell, Rec. Secy.
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Office: 2526½ Brooklyn Ave., L. A. 33
Meets 1st & 3rd Wednesdays,
37th Street

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GENERAL COUNSEL'S EXHIBIT No. 3.

Constitution and Laws of the United Brotherhood of Carpenters and Joiners of America

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Jurisdiction of District Councils

A Section 26. Where there are two or more Local Unions located in one city they must be represented in a Carpenters' District Council, composed exclusively of delegates from Local Unions of the United Brotherhood, and they shall be governed by such Laws and Trade Rules as shall be adopted by the District Council and approved by the Local Unions and the First General Vice-President. The General President shall have power to order such Local Unions to affiliate with such District Council, and to settle the lines of jurisdiction of such District Council, subject to appeal.

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RESPONDENTS' EXHIBIT No. 1

Labor Agreement Between Southern California General Contractors and United Brotherhood of Carpenters and Joiners of America

This Agreement entered into this 1st day of May, 1954, by and between the Associated General Contractors of America, Southern California Chapter, on behalf of its eligible members, the Building Contractors' Association of California, Inc., on behalf of its signatory members; the Excavating and Grading Contractors' Association, Inc., on behalf of its signatory members; and the Home Builders Institute, on behalf of its eligible members, parties of the first part, hereinafter referred to as the Contractors, and the United Brotherhood of Carpenters and Joiners of America, for its affiliated District Coun-

cils and Local Unions in Southern California, which have jurisdiction over the work in the territory hereinafter described; and the Building and Construction Trades Council of Los Angeles, all affiliated with the Building and Construction Trades Department of the American Federation of Labor, parties of the second part, hereinafter referred to as the Unions.

Witnesseth:

Purposes:

Whereas, the Contractors are engaged in general contract construction work in Southern California; and, Whereas, in the performance of its present and future contracting operations the Contractors are employing and will employ large numbers of workmen; and, Whereas, the Contractors desire to be assured of their ability to procure employees for all of the work which they may do in the area hereinafter defined as Southern California in sufficient numbers and skill to assure continuity of work in the completion of their construction contracts; and, Whereas, it is the desire of the parties to establish uniform rates of pay, hours of employment, and working conditions for the workmen employed by the Contractors; and, Whereas, it is the desire of the parties hereto to provide, establish and put into practice effective methods for the settlement of misunderstandings, disputes or grievances between the parties hereto to the end that the Contractors are assured continuity of operation and the workmen are assured continuity of employment, and industrial peace is maintained and the business of the industry

efficiently increased; Now, Therefore, in consideration of the premises and of the respective covenants and agreements of the parties hereto, each of which shall be interdependent, It Is Hereby Agreed:

I.

Coverage

* * * * *

F. That the Contractors and their subcontractors shall have freedom of choice in the purchase of materials, supplies and equipment, save and except that every reasonable effort shall be made by Contractors and their subcontractors to refrain from the use of materials, supplies or equipment, which use will tend to cause any discord or disturbance on the project. Workmen shall not be required to handle non-union material.

* * * * *

XIII.

Qualifications

A. That each of the parties hereto warrants and agrees that it is under no disability of any kind, whether arising out of the provisions of its Articles of Incorporation, Constitution, By-Laws, or otherwise, that will prevent it from fully and completely carrying out and performing each and all of the terms and conditions of this Agreement and, further, that it will not by the adoption or amendment of any provision of its Articles of Incorporation, Constitution, or By-Laws, or by contract or by any means whatsoever, take any action that will prevent or impede it in the full and complete performance of

each and every term and condition hereof. The warranties and agreements contained in this paragraph are made by each of the signatories hereto on his own behalf and on behalf of each organization for which it is acting hereunder. The individuals signing this Agreement in their official capacity and the signatories hereto hereby guarantee and warrant their authority to act for and bind the respective parties or organizations whom their signatures purport to represent, and the local unions on whose behalf the said parties are signing the said Agreement.

B. This Agreement contains all of the covenants, stipulations and provisions agreed upon by the parties hereto, and no agent or representative of either party has authority to make and none of the parties shall be bound by nor liable for any statement, representation, promise, inducement or agreement not set forth herein; that any provision in the working rules of the Unions, with reference to the relations between the Contractors and their employees, in conflict with the terms of this Agreement shall be deemed to be waived and any such rules or regulations which may hereafter be adopted by the Unions shall have no application to the work hereunder.

CERTIFICATE

This is to certify that the attached proceedings before the National Labor Relations Board for the 21st Region in the matter of: Local 1976, United Brotherhood of Carpenters and Joiners of America, AFL, etc., and Sand Door and Plywood Co., Case No. 21-CC-189, Los Angeles, California, October 18-22, 1954, were had as therein appears, and that this is the original transcript thereof for the files of the Board.

ACME REPORTING COMPANY,
Official Reporters

/s/ By FOSIG RAINIER,
Field Reporter

[fol. 208] Minute entry of argument and submission—December 13, 1956 (omitted in printing).

[fol. 210]

IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 15,026

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

LOCAL 1976, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL, and LOS ANGELES COUNTY DISTRICT COUNCIL OF CARPENTERS and NATHAN FLEISHER, Respondents.

PETITION FOR ENFORCEMENT OF ORDER OF THE NATIONAL LABOR RELATIONS BOARD

OPINION—February 12, 1957

Before: Healy, Lemmon, and Fee, Circuit Judges.

Lemmon, Circuit Judge.

While the National Labor Relations Act, hereinafter referred to as the Act, has been termed in "its inception a novel experiment", which "has remained a controversial piece of legislation",[1] its provisions dealing with secondary boycotts—at least insofar as they are applicable to the instant case—seem to us to be tolerably clear and eminently fair.

1. *Statement of the Case*

The Sand Door and Plywood Company, of Los Angeles, California hereinafter Sand, on August 25, 1954, filed a

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[1] Proposals for Modification of Unfair Labor Practice Procedures Under the NLRA, Stanford Law Review, December, 1956, Vol. 9, No. 1, pp. 155 et seq.

charge against the respondents, hereinafter the Union, alleging that the latter had engaged in unfair labor practices within the meaning of 29 USCA §158(b)(4)(A). [fol. 211]" On September 24, 1954, the General Counsel of the National Labor Relations Board, hereinafter the Board, before which the charge had been filed, presented a complaint against the Union, which in substance alleged that the Union, "since on or about August 17, 1954, . . . [had] instructed the employees of Havstad & Jensen" at a certain college to be detailed hereinafter, and the employees of other employers, "to refuse to install Paine Rezo doors [infra] because [the Union's] rules and by-laws prohibit the installation of products not bearing the union label," etc. It was further alleged that by such conduct the Union had "engaged in, and . . . induced and encouraged the employees of Havstad & Jensen and of other employers to engage in, strikes or concerted refusals in the course of their employment to use, manufacture, [etc.] . . . goods, articles, [etc.] . . . or to perform services."

The complaint also averred that an object of the Union's "acts and conduct . . . is to force or require Havstad & Jensen, Watson and Dreps [infra] and other employers or persons to cease using, [etc.] or otherwise dealing in the products of Sand and Paine and to cease doing business with Sand and Paine".

By the above acts, the complaint continued, the Union was engaging in unfair labor practices within §158(b)(4)(A).

The Union's answer denied the commission of the unfair labor practices alleged, and affirmatively averred that "the Board lacked jurisdiction over the subject matter of the complaint or of the persons of the respondents".

On October 15, 1954, Sand filed a "First Amended Charge", and on the same day the Board filed an "Amendment to Complaint", neither of which materially altered their respective original allegations.

On December 13, 1954, the Trial Examiner filed an "Intermediate Report and Recommended Order", in which it was "recommended that the complaint be dismissed in its entirety".

On August 26, 1955, the Board handed down a "Decision and Order" holding that "By inducing and encouraging

employees of Haystad and Jensen to engage in a strike or concerted refusal in the course of their employment to handle or install doors manufactured by Paine Lumber company [hereafter Paine], an object thereof being to [fol. 212] force and require Haystad and Jensen to cease using, handling or otherwise dealing in the products of Paine . . . and to force or require Sand . . . to cease doing business with Paine . . . , the [Union has] engaged in and [is] engaging in unfair labor practices within the meaning of Section 8(b)(4)(A) of the Act". 113 NLRB 1210, No. 123.

The Decision and Order were signed by two members of the Board, including the chairman, and was specially concurred in by a third member. Two members dissented.

On February 3, 1956, the Board filed in this Court a petition for enforcement of the Board's order. It is that petition which we are here considering.

2. *Statement of Facts*

Haystad and Jensen, joint venturers, were engaged in the construction of a hospital and other buildings on the campus of the College of Medical Evangelists, a medical school and nurses' training school owned and operated by the Seventh Day Adventists in Los Angeles.

Doors for the hospital, which was known as the White Memorial Hospital, were manufactured by Paine, and were purchased by Sand, a wholesale jobber and exclusive agent for Paine in Southern California. Sand sold the doors to Watson & Dreps, mill work contractors, with delivery between August 14, 1954, and August 17, 1954. Although counsel for the Union claims that "The record does not show what Watson & Dreps did with these doors", there is testimony that delivery of the doors to the job, where Haystad & Jensen were in charge, commenced on the Friday before August 17, and that on August 17, a member of the firm of Watson & Dreps informed James C. Barron, vice president and general manager of Sand, that Emmett R. Jensen, one of the joint venturers with Larry C. Haystad, had reported "that the carpenters on the job had refused to handle the doors because the doors did not have a union label." This testimony provides a sufficient link be-

tween Watson and Dreps and Havstad & Jensen, as regards the doors.

Between 10 and 11 o'clock in the forenoon of August 17, 1954, Arnold Steinert, carpenter foreman of Havstad & [fol. 213] Jensen, was told by Nathan Fleisher, business agent of Local 1976, one of the respondents herein, that "we'd have to quit hanging the doors until they got it settled that they were union or non-union doors, and they were going to check on 'em and in a day or two they would be cleared and then we could go ahead and go to work . . . he said they were non-union doors, and they didn't have a label and we'd have to quit hanging the doors until it was settled."

Earlier in the morning, Steinert had assigned laborers "to move the doors from floor to floor, the doors that went on each floor". He had also assigned Sam Agronovich, a carpenter, to start hanging doors. When Steinert received the order from Fleisher "to quit hanging the doors", he proceeded to carry out the mandate:

> "Well, the laborers were moving the doors from floor to floor so I told them to leave them alone, leave 'em set and we went down into the basement where Sam Agronovich was working and told him we'd have to quit hanging the doors because they weren't union until they got it settled."

Fleisher was present when Steinert talked to Agronovich.

When James Layton Nicholson, Havstad & Jensen's general superintendent of construction on the White Memorial Hospital project, arrived at his office that same morning, he was informed by the firm's secretary that "Fleisher had been on the job and had called the carpenters off from hanging the doors." Nicholson went to the jobsite and "observed that the laborers that [were] supposed to be placing the doors were not working at the time". When he asked the laborers for the reason, "All they said is that the union stopped them from hanging the doors. . . . and they [were] waiting for my foreman to replace them, or, in other words, give them other duties. . . ."

Nicholson found Fleisher, who was also at the building site, and asked him why he had stopped the men from

hanging the doors. The following conversation, according to Nicholson, ensued:

> "He says he had orders from the District Council that morning to stop them from hanging the doors until they could establish the fact whether they were union or non-union made doors. He says, 'I could have [fol. 214] pulled them off yesterday but I waited until today.' And I told him at the time that, well, I says that I always thought I should have notice before anybody could be pulled off, and he says, 'Well, those are my orders', so he says 'We will have to stop hanging the doors until they get cleared by the union'."

At that juncture, Sam Agronovich and Saul Agronovich, the latter being the steward and also a carpenter, came up. Superintendent Nicholson at first told them that "if we can't hang the doors they might as well pick up their tools." Later Nicholson reconsidered the matter and told Steinert "to relocate the men and in such a way they could keep on working."

On that day and the next, James C. Barron, the Sand executive, supra, got into touch by telephone with Earl Thomas, of the Los Angeles County District Council of Carpenters. In a second conversation Thomas informed Barron that he had received a telegram from a union officer in Wisconsin, informing him that "the doors were not union made and that Paine . . . did not belong to any union." According to Barron, the following conversation then ensued:

> "I replied to him that—'Well, what are we going to do here, because the doors are here, and we are an innocent bystander? We are union and Watson & Dreps are union and the contractors are union, even the people that hauled the doors out here on the train were union people.' He said, 'Well, . . . under the circumstances, we can't hang non-union doors,' but he said to me, 'Why don't you buy union doors?'"

Barron also talked to Fleisher, who told him "that the doors don't have a union label, and they have to be cleared before I can permit them to be hung."

Jensen, of Havstad & Jensen, also talked to Thomas, who told him that he had found out that Paine "was not a union operation," and "that the carpenters would not be able to handle those doors".

On Tuesday, October 5, 1954, after Sand had filed the instant charges and the Board had sought a temporary restraining order, Superintendent Nicholson, who was himself "a union man", and Steinert asked each carpenter, separately, whether he "would be willing to hang the doors", and from each there was received a negative reply, though some of the carpenters qualified their answers by saying that they would hang the doors if they "could get clearance" on them, or if the doors "were released". [fol. 215]

The "By-Laws and Trade Rules" of the District Council of Carpenters of the United Brotherhood of Carpenters of America, of which Steinert was a member, provided that "Only members of the . . . Brotherhood . . . shall be permitted to do carpenter work on any job", and that "No member shall use, handle, install or erect any material produced or manufactured from wood that is not produced and manufactured by members of the . . . Brotherhood . . ."

Similarly, the "Labor Agreement Between Southern California General Contractors and United Brotherhood of Carpenters and Joiners of America," hereinafter "Labor Agreement", contains the following provision:

> "Workmen shall not be required to handle non-union material."

The crucial question in this connection is whether such a provision justifies *a work stoppage* by the employees.

3. *The Applicable Statute*

§158. Unfair labor practices.

* * * * * * *

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * * * *

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or [fol. 216] otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; . . ."

4. *The Board's Assertion of Jurisdiction was Proper*

Before the trial examiner, it was stipulated that in 1953, Sand received from Paine, the headquarters of which was at Oshkosh, Wisconsin, materials, including doors, valued at $185,796.84. From January 1, 1954, to September 8, 1954, inclusive, Sand received from Paine, materials, including doors, valued at $103,503.05. The doors in controversy are valued at $9,148.32. Sand received the doors between August 10 and August 14, 1954, and notified Watson & Dreps, the buyers, who took delivery at Sand's warehouse during the period between August 14 and August 17. We have already traced the delivery of the doors from Watson & Dreps to Haystad & Jensen.

In other words, Paine, whose products were the real target of the Union's actions, shipped materials valued at more than $100,000 from its Wisconsin plant to Sand, its Southern California distributor, during the first nine months of 1954, the crucial period here.

The Union, by refusing to use the doors on the Haystad & Jensen hospital job in Los Angeles, thereby interfered with more than a so-called *de minimis* flow of shipments into California. This is sufficient to bring the Union's obstructionist activities within the Board's legal jurisdiction.

In National Labor Relations Board v Denver Building & Construction Trades Council, 1951, 341 U.S. 675, 683-684, the Board had found that the activities complained of had had a sufficient impact upon interstate commerce to sustain

its jurisdiction, and the Court of Appeals was satisfied. The Supreme Court commented that "We see no justification for reversing that conclusion." and added:

> "The Board found that, in 1947, Gould & Preisner purchased $86,560.30 of raw materials, of which $55,745.25, or about 65% were purchased outside of Colorado. Also, much of the merchandise it purchased in Colorado had been produced outside of that State. [fol. 217] While Gould & Preisner performed no services outside of Colorado, it shipped $5,000 of its products outside of that State. Up to the time when its services were discontinued on the instant project, it had expended on it about $315 for labor and about $350 for materials. On a 65% basis, $225 of those materials would be from out of the State. The Board adopted its examiner's finding that any widespread application of the practices here charged might well result in substantially decreasing the influx of materials into Colorado from outside the State and it recognized that Gould & Preisner's annual purchase of over $55,000 of such materials was not negligible.
>
> "The Board also adopted the finding that the activities complained of had a close, intimate and substantial relation to trade, traffic and commerce among the states and that they tended to lead, and had led, to labor disputes burdening and obstructing commerce and the free flow of commerce. *The fact that the instant building, after its completion, might be used only for local purposes does not alter the fact that its construction, as distinguished from its later use, affected interstate commerce.*" [Emphasis supplied.][2]

It is immaterial, so far as the Board's legal jurisdiction is concerned, that Havstad & Jensen obtained the doors from Paine from an intermediary in California—Watson & Dreps—rather than by direct shipment from out of the State. See National Labor Relations Board v Cowell Port-

[2] See also Local 74, United Brotherhood of Carpenters & Joiners of America v National Labor Relations Board, 1951, 341 U.S. 707, 712.

land Cement Co., 9 Cir., 1945, 148 F.2d 237, 242, certiorari denied, 1945, 326 U.S. 735; National Labor Relations Board v. Townsend, 9 Cir., 1950, 185 F.2d 378, 382-383, certiorari denied, 1951, 341 U.S. 909.

We agree with the Board that the Trial Examiner erroneously designated Havstad & Jensen as the primary employer, in considering whether jurisdiction was to be asserted. Havstad & Jensen was a neutral employer whose carpenters were unlawfully induced by Fleisher, via Steinert, to refuse to install the doors in question. Paine was the primary employer, for it was *Paine's* products to which the Union objected. Havstad & Jensen was the *secondary* employer.

[fol. 218] It is clear, then, that the dispute had a sufficient impact upon commerce to be subject to the Board's jurisdiction as a matter of law. We next address ourselves to the question of whether the Board should have *assumed* jurisdiction in the instant case. In other words, does the present controversy meet what the Union terms the Board's "monetary" standards?

In Jonesboro Grain Drying Co-operative, Case No. 32-RC-693, 110 NLRB 481, 483, No. 67, decided on October 26, 1954, the Board announced, *inter alia*, the following jurisdictional standard:

> "Accordingly, we have determined that in future cases the Board will assert jurisdiction over enterprises which annually meet *one or more* of the following standards:
>
> * * * * * * *
>
> "(2) *Direct outflow standard:*
>
> An enterprise which produces or handles goods and ships such goods out of State, or performs services outside the State in which the enterprise is located, valued at $50,000 or more." [Emphasis supplied.]

In Truck Drivers Local Union No. 649, (Jamestown Builders Exchange), Case No. 3-CC-19, 93 NLRB 386, 387, No. 51, decided on February 23, 1951, the Board said:

> "By its very nature the effect of a secondary boycott extends beyond the operations of the primary employer with which the union is engaged in a dispute, and reaches the secondary employers whom the Union is attempting to force or require to cease dealing with the primary employer by means prescribed [*sic*] in Section 8(b)(4) [29 USCA §158(b)(4), *supra*]."

Chief Judge Clark, in National Labor Relations Board v Associated Musicians, etc., 2 Cir., 1955, 226 F.2d 900, 907, certiorari denied, 1956, 351 U.S. 962, commented:

> "In any event it is doubtful under the Act whether coverage of the secondary employer need be established independent of coverage of the primary employer. . . . We think the better view is that the secondary activity is but an extension of the labor dispute with the primary employer and that the businesses [fol. 219] of both employers are to be considered in determining jurisdiction of the secondary activity. The opposite conclusion would require the fragmenting of the authority of the Board over labor disputes—a result which, lacking specific legislative command, we should shun. [Citing *Jamestown Builders Exchange*, *supra*, and McAllister Transfer case, *infra*.]"[3]

Finally, as Judge Mathews observed in National Labor Relations Board v Stoller, 9 Cir., 1953, 207 F.2d 305, 307, certiorari denied, 1954, 347 U.S. 919, "The general rule is that, where the Board has jurisdiction, as it had in this case, whether such jurisdiction should be exercised is for the Board, not the courts, to determine."

The Board's assertion of jurisdiction in the instant case was proper.

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[3] See also Joliet Contractors Ass'n v National Labor Relations Board, 7 Cir., 1952, 193 F.2d 833, 840.

5. *The Board was Correct in Finding That the Union Violated the Act by Inducing Employees of Havstad & Jensen to Refuse to Install Paine Doors*

As we have seen, the evidence shows that there is no serious question that Steinert, following Fleisher's instructions, caused employees of Havstad & Jensen to engage in a concerted work stoppage for the object forbidden by Section 8(b)(4)(A).

The union contends that "If this idleness can be termed a work stoppage, it is clear that the cessation did not originate with the employees but was a direct result of managerial orders." It is also urged that "Havstad & Jensen were parties to and bound by a collective bargaining agreement whereby they had previously agreed not to require 'workmen to handle non-union materials'."

In our view, there was inducement to a concerted refusal in the statutory sense, not authorized by the contract between Havstad & Jensen and the Union. An employer may well remain free to decide, as a matter of business policy, whether he will accede to a union's boycott demands, or, if he has already agreed to do so, whether he will fulfill his agreement. An entirely different situation, [fol. 220] however, is presented under §8(b)(4)(A) of the Act (29 USCA §158(b)(4)(A), supra) when it is sought to influence the employer's decision by a work stoppage of his employees. Such a work stoppage, Congress has plainly declared, is unlawful, when the object—clearly present here—"is . . . forcing or requiring any employer . . . to cease using . . . the products of any other . . . manufacturer, or to cease doing business with any other person".

In the instant case, we have seen that, despite the "hot cargo" provision in the contract, *supra*, the employees had actually been handling Paine doors. They ceased doing so only upon Fleisher's and Steiner's orders. Those orders, we think, were in direct contravention of the mandate.

In National Labor Relations Board v Washington-Oregon Shingle Weavers' Dist. Council, 9 Cir., 1954, 211 F.2d 149, 152, we said:

> "The prohibited object of the boycott is stated by the statute to be 'forcing * * * any employer or other

person to cease using * * * the products of any other producer, processor, or manufacturer * * *.' In fact, if the object is sought, not because of any dispute, but merely because the union dislikes the other producer for any reason, or for no reason, the conduct would appear even more reprehensible. * * * The only dispute between the Union and the Company was over the latter's use of unfair shingles, and had no bearing on wages, working conditions, etc. In such a case, a strike called by the Union can have no other purpose than to compel the Company to cease using what the Union considers unfair shingles.

"Furthermore, the legislative history of the Act [*infra*] clearly shows that Congress intended to proscribe exactly the type of union action involved here."

In General Drivers, etc., and American Iron and Machine Works Company, No. 121, 115 NLRB 800, 801, decided on March 15, 1956, the Board said:

"1. We find, as did the Trial Examiner, that Respondent Teamsters, by its inducement of Employees [fol. 221] of the common carriers (secondary employers) to engage in a concerted refusal in the course of their employment to handle freight brought by American Iron and Machine Works Company (the primary employer) to the carriers' docks, with an object of forcing or requiring the carriers to cease doing business with American Iron, violated Section 8(b)(4)(A) of the Act.

"Like the Trial Examiner, we reject the contention of Teamsters that its conduct was excused by the 'hot cargo' clause in the Teamsters' contracts with the common carriers. This clause provided that members of Teamsters 'shall not be allowed to handle or haul freight to or from an unfair company.' However, in rejecting this defense, we do not rely, as did the Trial Examiner on [McAllister Transfer, Inc., 110 NLRB 1769] but rather on the more recent Board decision in [Sand Door and Plywood Co., 113 NLRB

1210, No. 123, decided August 26, 1955][1] which was decided after the issuance of the Intermediate Report in the case at bar. As stated in the principal opinion in that case, regardless of the existence of a 'hot cargo' clause, any direct appeal to employees by a union to engage in a strike or concerted refusal to handle a product is proscribed by the Act when one of the objectives set forth in Section 8(b)(4)(A) is present. Thus, while Section 8(b)(4)(A) does not forbid the execution of a hot cargo clause or a union's enforcement thereof by appeals to the *employer* to honor his contract, the Act does, in our opinion, preclude enforcement of such clause by appeals to employees, and this is so whether or not the employer acquiesces in the union's demand that the employees refuse to handle the 'hot' goods." [Emphasis supplied.]

Similarly, in International Brotherhood of Teamsters, etc., and McAllister Transfer, Inc., 110 NLRB 1769, No. 224, supra, decided on December 16, 1954, the Board used the following language:

"We are concerned here with clauses in collective-bargaining agreements, commonly known as 'hot cargo' clauses, which provide that the Union and employees [fol. 222] may refuse to handle goods designated as 'unfair' and that such refusal shall not be deemed a violation of the contract or cause for discharge. . . . The Respondents in the instant case, as part of their efforts to force McAllister's employees to join their locals, determined that McAllister freight was 'unfair'. The Respondents thereupon engaged in a boycott of McAllister freight through other common carriers, . . . with which they had contracts containing so-called 'hot cargo' clauses. . . .

"Essentially, then, the basic question, as we see it, is whether these ['hot cargo'] clauses constitute a meritorious defense to the complaint which alleges violations of Section 8(b)(4)(A) and (B).

[1]—the instant case.

"In enacting these provisions of the Act, it is clear that Congress declared a public policy against *all* secondary boycotts, without distinction as to type or kind.

"As the late Senator Taft stated in the course of the legislative debate:

"'The Senator will find a great many decisions . . . which hold that under the common law a secondary boycotts is unlawful. Subsequently, under the provisions of the Norris-LaGuardia Act, it became impossible to stop a secondary boycott or any other kind of a strike, no matter how unlawful it may have been at common law. All this provision of the bill does is to reverse the effect of the law as to secondary boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have broadened the provisions dealing with secondary boycotts as to make them an unfair labor practice.' 93 Cong. Rec. 4323.

"More specifically, Senate Report No. 105 on S.1126 stated:

"'Because of the nature of certain of these practices, especially jurisdictional disputes and *secondary boycotts* and strikes for specifically defined objectives, the committee is convinced that additional procedures must be made available under the National Labor Relations Act *in order adequately to protect the public welfare which is intricately involved in labor disputes*. . . .

* * * * * * *

[fol. 223] "Hence, we have provided that the Board, *acting in the public interest and not in vindication of purely private rights*, may seek injunctive relief in the case of all types of unfair labor practices and that it shall also seek such relief in the case of strikes and *boycotts* defined as 'unfair labor practices.' [Emphasis added by the Board.]

"We deem it significant that Congress spoke in unmistakable terms of the protection of 'the public welfare which is inextricably involved' in such disputes, and pointedly characterized the Board as 'acting in the public interest and not in vindication of purely private rights'. It is of course, a necessary concomitant of the protection of the public welfare that protection is also extended to employees and employers as well. But it is only fair to say that such protection to private interests was in no way intended by Congress to detract from the public interest that constitutes the very foundation of the policies implicit in these statutory enactments. It has by this time become axiomatic that the exclusive grant of authority to the Board to prevent unfair labor practices affecting commerce was to insure that the existence of some private agreements at odds with the statute does not preclude the Board from acting in the public interest. . . .

* * * * * * *

". . . we necessarily feel constrained to pass on the validity of the 'hot cargo' clauses offered as a defense for the Respondent's conduct, and to make the unequivocal finding that such clauses are contrary to public policy and cannot therefore serve as a defense."

As was observed by Judge Bratton in National Labor Relations Board v United Brotherhood of Carpenters and Joiners, etc., 10 Cir., 1950, 184 F.2d 60, 64, certiorari denied, 1951, 341 U.S. 947, "The basic purpose and objective of the section of the Act is to prohibit the involvement of employers in labor disputes of other employers with whom they are doing business."

Finally, we consider the Union's argument that the work stoppage "was a direct result of managerial orders". The contention is based upon the theory that Steinert, the [fol. 224] foreman, "acted solely as a representative of management when he instructed employees to cease their work on the doors".

Steinert was a member of Local 563 of the Union. The By-Laws and Trade Rules of the Los Angeles County

District Council of Carpenters required that he belong to the Union, and that he should hire no non-union members. As foreman, he and the steward were "equally responsible for the enforcement of all By-Laws and Trade Rules," etc. Violators of that rule were "subject to a fine of $100.00 and/or expulsion".

Therefore, when Fleisher ordered Steinert to stop work on the doors because they were non-union, it is logical to assume that he was invoking Steinert's obligations under the Union's rules. Cf. National Labor Relations Board v. Cement Masons Local No. 555, 9 Cir., 1955, 225 F.2d 168, 173-174, and cases there cited.

The fact that in some respects foremen, as has been said of buyers, "may also be agents of employers does not eliminate them from the scope of" §158(b)(4)(A). Amalgamated Meat Cutters, etc. v. National Labor Relations Board, CA D.C., 1956, 237 F.2d 20, 23.

The Union seeks to brush aside the force of its own rules by quoting the closing clause of Article XIII of the "Labor Agreement Between Southern California General Contractors and United Brotherhood of Carpenters and Joiners of America", which reads as follows:

> ". . . that any provision in the working rules of the Unions, with reference to the relations between the Contractors and their employees, in conflict with the terms of this Agreement shall be deemed to be waived and any such rules or regulations which may hereafter be adopted by the Unions shall have no application to the work hereunder."

The above rule is not applicable here. We are not now concerned with Steinert's "relations" to "the contractors", but with his "relations" to his Union and his status and obligations therein. No contract with his employers could interfere with those relations, so long as he remained a member of the Union, which he indubitably was. So long as he remained a member, he was bound by the Union rules [fol. 225] governing his relations to the Union. The proposition is so plain as to require no further elaboration.

Nor could Steinert "waive" the Union's power to fine him $100 for violating the subsection of the "By-Laws and Trade Rules" holding him jointly responsible with the steward for their enforcement!

We hold that the Board was correct in holding that the Union, through its foreman Steinert and its business agent Fleisher, violated §158(b)(4)(A) by ordering employees of Havstad and Jensen to refuse to install Paine doors.

6. *Conclusion*

Accordingly, we hold that the Board's assertion of jurisdiction was proper, and that it was correct in finding that the Union violated the Act by ordering employees of Havstad & Jensen to refuse to install doors that had been manufactured by Paine.

A decree should issue enforcing the Board's order in full.

[File endorsement omitted]

[fol. 226] IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15026

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

LOCAL 1976, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL, and LOS ANGELES COUNTY DISTRICT COUNCIL OF CARPENTERS, and NATHAN FLEISHER, Respondents.

DECREE ENFORCING AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

Before: Healy, Lemmon, and Fee, Circuit Judges.

This cause came on to be heard upon the petition of the National Labor Relations Board to enforce its order dated August 26, 1955. The Court heard argument of respective counsel on December 13, 1956, and has considered the briefs and the transcript of record filed in this cause. On February 12, 1957, the Court, being fully advised in the

premises, handed down its decision enforcing the said order. In conformity therewith it is hereby.

Ordered, Adjudged and Decreed that the Respondents, Local 1976, United Brotherhood of Carpenters and Joiners of America, AFL, and Los Angeles County District Council of Carpenters, and their officers, representatives, successors, assigns, and agents, including Respondent Nathan Fleisher, shall:

1. Cease and desist from inducing or encouraging the employees of Haystad & Jensen, or any other employer, to engage in a strike or concerted refusal in the course of their employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services for their employer, where an object thereof is to force or require [fol. 227] Haystad & Jensen or any other employer or person to cease using, handling, or otherwise dealing in the products of Paine Lumber Company or any other nonunion manufacturer, or to force or require Sand Door and Plywood Co., or any other employer or person, to cease doing business with Paine Lumber Company or any other nonunion manufacturer.

2. Take the following affirmative action, which the National Labor Relations Board has found will effectuate the policies of the act:

(a) Post at their Los Angeles, California, business offices, respectively, copies of the notice attached hereto as "Appendix A." Copies of said notice, to be furnished by the Regional Director of the National Labor Relations Board for the Twenty-first Region, Los Angeles, California, shall, after being duly signed by the official representatives of the Respondents, including Nathan Fleisher, be posted by the Respondents Local 1976 and District Council, immediately upon receipt thereof, and maintained by them for a period of sixty (60) consecutive days thereafter, in conspicuous places including all places where notices to members of said labor organizations are customarily posted. Reasonable steps shall be taken by said Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the aforesaid Regional Director in writing, within ten (10) days from the date of this Decree what steps the Respondents have taken to comply herewith.

/s/ Paul P. O'Brien
Paul P. O'Brien
Clerk

NOTICE TO ALL MEMBERS OF LOCAL 1976 AND OF LOS ANGELES COUNTY DISTRICT COUNCIL OF CARPENTERS, AND EMPLOYEES OF HAVSTAD AND JENSEN

PURSUANT TO

a Decree of the United States Court of Appeals, Enforcing an Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our members that:

WE WILL NOT induce or encourage the employees of Haystad & Jensen, or any other employer, to engage in a strike or concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services for their employer where an object thereof is to force or require Haystad & Jensen or any other employer or person to cease using, handling, or otherwise dealing in the products of Paine Lumber Company or any other nonunion manufacturer, or to force or require Sand Door and Plywood Co. or any other employer or person to cease doing business with Paine Lumber Company or any other nonunion manufacturer.

LOS ANGELES COUNTY DISTRICT COUNCIL OF CARPENTERS

Dated ..... By .....
(Representative) (Title)

LOCAL 1976, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL

Dated ..... By .....
(Representative) (Title)

Dated ..... By .....
Nathan Fleisher Business Representative

[fol. 229] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 230] SUPREME COURT OF THE UNITED STATES

No. 127, October Term, 1957

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 14, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and the case is consolidated with Nos. 273 and 324 for argument. The Unions involved are allowed a total of 3 hours for oral argument and the National Labor Relations Board is allowed a total of one hour and a half for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 273

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 886, AFL-CIO

No. 324

LOCAL 850, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 273, PETITION FOR CERTIORARI FILED JULY 12, 1957

NO. 324, PETITION FOR CERTIORARI FILED JULY 30, 1957

CERTIORARI GRANTED OCTOBER 14, 1957

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,394

GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 886, AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

No. 13,406

LOCAL 850, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

On Petitions to Review and Set Aside, and on Request for Enforcement of, an Order of the National Labor Relations Board

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JOINT APPENDIX

(General Counsel's Exhibit 1-F).

472 UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SIXTEENTH REGION

Case No. 16-CC-47

In the Matter of

GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 886, AFL

and

AMERICAN IRON AND MACHINE WORKS COMPANY

Complaint

It having been charged by American Iron and Machine Works Company, 518 North Indiana Avenue, Oklahoma City, Oklahoma, hereinafter referred to as American Iron, under dates of September 23, 1954, and September 24, 1954, that General Drivers, Chauffeurs, Warehousemen and Helpers Union, Local No. 886, AFL, 2910 Northwest 12th Street, Oklahoma City, Oklahoma, hereinafter referred to as Respondent Teamsters, has engaged in and is engaging in certain unfair labor practices affecting commerce as set forth and defined in the Labor Management Relations Act, 61 Stat. 161, hereinafter referred to as the Act, the General Counsel for the National Labor Relations Board, hereinafter referred to as the Board, by the Regional Director for the 16th Region of the Board, hereby alleges as follows:

1. Respondent Teamsters is a labor organization within the meaning of Section 2, Subsection (5) of the Act.

2. American Iron is and has been at all times material hereto a corporation duly existing by virtue of the
473 laws of the State of Oklahoma, having its principal office and place of business at 518 North Indiana Avenue, Oklahoma City, Oklahoma, and maintaining two

other places of business, 601 North Indiana, and 901 South High Avenue, Oklahoma City, Oklahoma, and is now and has been at all times herein mentioned continuously engaged at said places of business in the manufacture of oil field equipment.

3. American Iron in the course and conduct of its business operations during the past 12-month period, which period is representative of all times material hereto, manufactured, sold and shipped oil field equipment valued in excess of $1,000,000.00 from its Oklahoma City plants to points outside the State of Oklahoma.

4. A copy of the original Charge hereinabove referred to was served on the Respondent Teamsters on September 25, 1954, and a copy of the First Amended Charge hereinabove referred to was served on the Respondent Teamsters by registered mail on September 28, 1954. A copy of said Charge and Amended Charge are attached hereto as Exhibits "A" and "B" and are made a part hereof.

5. At all times material hereto Gillette Motor Transport, Inc., herein called Gillette; D. C. Hall Transport, Inc., herein called Hall; Lee Way Motor Freight Lines, herein called Lee Way; Santa Fe Trails Transportation Company, herein called Sante Fe, and Time, Inc., herein called Time, were common carriers for hire engaged in the business of hauling freight by motor vehicle under license from the Interstate Commerce Commission. Each of said common carriers maintain terminals, docks or loading facilities in Oklahoma City, Oklahoma, where they accept, load and unload freight. Each of said common carriers also maintain terminals, docks and loading facilities in other
474 states of the United States where they accept, load and unload freight, and are engaged at all such places in the business of transporting freight by said motor vehicles in and between various states of the United States.

Such common carriers commonly carry freight for American Iron.

6. At all times material hereto Respondent Teamsters has been the bargaining representative of the dock employees and drivers of Gillette, Hall, Lee Way, Santa Fe, and Time at their respective Oklahoma City terminals where they are engaged in the business set forth above in Paragraph 5.

7. Lodge 850, International Association of Machinists, AFL, 617 Southwest 29th Street, Oklahoma City, Oklahoma, hereinafter referred to as Machinists, is a labor organization within the meaning of Section 2, Subsection (5) of the Act, and at all times material hereto is and has been the collective bargaining representative of American Iron production and maintenance employees.

8. Since on or about September 15, 1954, Machinists, the collective bargaining representative of American Iron production and maintenance employees, has been engaged in a strike at American Iron premises in Oklahoma City as aforementioned, concerning terms and conditions of employment of American Iron production and maintenance employees. In connection with said strike, the Machinists has picketed American Iron's three places of business located at Oklahoma City, as set forth in Paragraph 2, where the employees work that the Machinists represent.

9. At no time material hereto have the Machinists been the collective bargaining representative of any employees of American Iron who have picked up freight for American Iron at the aforesaid common carrier's places of business or delivered freight of American Iron to the said common carriers for transportation. There is no
475 dispute between Machinists and American Iron concerning wages, hours or other terms or conditions of employment of such employees of American Iron.

10. At no time material hereto has Respondent Teamsters been the collective bargaining representative of any employees of American Iron.

11. At no time material hereto has Respondent Teamsters had a labor dispute with American Iron or any of the above common carriers concerning the wages, hours or other terms or conditions of employment of any employees of American Iron or any of the respective common carriers.

12. Since on or about September 16, 1954, Respondent Teamsters by and through its agents, including Santa Fe Drivers' Steward, J. W. Jakeway, has induced and encouraged, despite the opposition of Santa Fe, the employees of Santa Fe to refuse to haul American Iron freight which freight had been loaded in and upon the trucks and trailers which these employees were to operate.

13. Since on or about September 21, 1954, all of the checkers, drivers, forklift operators, winch operators, dockmen and helpers of Santa Fe have refused to receive, check, haul or otherwise handle American Iron freight.

14. Upon each and every occasion named above in Paragraphs 12 and 13, Santa Fe by and through its agents, J. P. Smith and Charles W. Dean, has specifically instructed said employees mentioned above in Paragraphs 12 and 13 to receive, check, haul or otherwise handle said American Iron Freight.

15. On or about September 17, 1954, Respondent Teamsters by and through its Santa Fe Dock Steward, Clifford M. Troxel, orally instructed all Santa Fe dock employees to refuse to handle freight to or from American Iron.

476 16. On or about September 26, 1954, Respondent Teamsters by and through its agents, Ralph Mitchell

and Clifford Troxel, again instructed all Santa Fe dock employees to refuse to handle American Iron Freight.

17. On or about October 6, 1954, Respondent Teamsters by and through its agents, Ralph Mitchell and Robert Hawkins, Gillette Dock Steward, orally instructed Gillette dock employees to refuse to receive, check or otherwise handle American Iron Freight.

18. On or about October 6, 1954, the Gillette dock employees refused to receive, check or otherwise handle American Iron freight.

19. On or about October 6, 1954, after the incident related in Paragraph 18 above, Gillette by and through their Local Freight Agent, Mr. Berrong, instructed said Gillette dock employees to go ahead and receive, check and otherwise handle American Iron freight despite their refusal, whereupon said Gillette employees did receive, check or otherwise handle American Iron freight.

20. Since on or about September 17, 1954, Respondent Teamsters by and through its agents, Ralph Mitchell and Roy McGilliard, Time Dock Steward, by appeals and oral instructions has induced and encouraged Time dock employees to refuse to receive, check or otherwise handle American Iron freight.

21. Since on or about October 5 or 6, 1954, Respondent Teamsters by and through its agents, Ralph Mitchell and Roy McGilliard, and its Time employees union members, has attempted to keep Time supervisory personnel from handling the American Iron freight by oral statements, threats, and appeals.

477 22. Since on or about September 16, 1954, Respondent Teamsters, by and through its agents, Ralph Mitchell and Bobby L. Wilkerson, Hall Dock Steward, has by oral instructions, threats and appeals

induced and encouraged Hall dock employees to refuse to receive, check or otherwise handle American Iron freight.

23. Since on or about September 16, 1954, Hall dock employees have refused to receive, check or otherwise handle American Iron freight although Hall has specifically instructed said employees to handle American Iron freight.

24. By its conduct set forth above in Paragraphs 12 through 23 and by orders, instructions, directions, appeals, by-laws, union policy, threats, and other means, Respondent Teamsters since on or about September 16, has engaged in and has induced and encouraged the employees of Santa Fe, Gillette, Time and Hall to engage in strikes or concerted refusals in the course of their employment to use, manufacture, transport or otherwise handle or work on goods, articles, materials, or commodities or to perform services.

25. An object of Respondent Teamsters' conduct set forth above in Paragraphs 12 through 24 is to force or require Santa Fe, Gillette, Time, and Hall, respectively, despite their respective opposition, to cease using, selling, handling, transporting or otherwise dealing in products of American Iron and to cease doing business with American Iron.

478 26. By the acts described above in Paragraphs 12 through 24 for the reasons set forth above in Paragraphs 24 and 25, Respondent Teamsters did engage in and is thereby engaging unfair labor practices within the meaning of Section 8 (b), Subsection (4) (A) of the Act.

27. By the acts described above in Paragraphs 12 through 24 and for the reasons set forth in Paragraphs 24 and 25, and by each of said acts the Respondent Teamsters did restrain and coerce and is restraining and coercing the employees in the exercise of the rights guaranteed in Section 7 of the Act and did thereby engage in and is there-

by engaging in unfair labor practices within the meaning of Section 8 (b), Subsection (1) (A) of the Act.

28. The activities of the Respondent Teamsters described above in Paragraphs 12 through 24, occurring in connection with the operations of the employers named above in Paragraphs 2, 3 and 5, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

479. 29. The acts of the Respondent Teamsters described above constitute unfair labor practices affecting commerce within the meaning of Section 8 (b), Subsections (1) (A) and (4) (A) and Section 2, Subsections (6) and (7) of the Act.

WHEREFORE, the General Counsel for the National Labor Relations Board has caused this Complaint to be signed and issued by the Regional Director for the 16th Region on the 23rd day of October, 1954, against General Drivers, Chauffeurs, Warehousemen & Helpers Union, Local No. 886, AFL, Respondent herein.

EDWIN A. ELLIOTT
Edwin A. Elliott, *Regional Director*
National Labor Relations Board
Sixteenth Region

(Seal)

(General Counsel's Exhibit 1-J)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SIXTEENTH REGION

Case No. 16-CC-47

In the Matter of

GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 886, AFL

and

AMERICAN IRON AND MACHINE WORKS COMPANY

Answer

Comes now the General Drivers, Chauffeurs, Warehousemen and Helpers Union, Local 886, AFL, hereinafter referred to as Respondent Teamsters, and enters the following Answer to the Complaint filed herein;

1. The Respondent Teamsters insofar as its knowledge of the facts, admit the allegations contained in the Complaint, from paragraph 1. (one) to paragraph 20. (twenty) inclusive.

2. The Respondent Teamsters admit paragraph 21. of the Complaint, except they deny that they have used any threats against anyone.

3. The Respondent Teamsters admit paragraph 22. of the Complaint, except they deny they have used any threats against anyone.

4. The Respondent Teamsters admit insofar as its knowledge is concerned that paragraph 23. is true.

5. The Respondent Teamsters deny generally and specifically, paragraphs 24. to paragraphs 29. inclusive.

6. Further answering the Respondents Teamsters state that the activities of its agents and business representatives have been directed to the sole purpose of complying with

its contract governing the situation with the employers involved herein: They deny that in so doing they have violated the National Labor Relations Act.

Dated this 1st day of November, 1954.

Signed FRANK GRAYSON, *Attorney for Respondent Teamsters*

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Address of Attorney
410 Leonhardt Building
Oklahoma City, Oklahoma

STATE OF OKLAHOMA }
OKLAHOMA COUNTY } ss.

Frank Grayson, being first duly sworn, deposes and says: That he is the duly authorized agent and attorney for the Respondent Teamsters; that he has read the foregoing answer and that the allegations and statements therein contained are true and correct to the best knowledge and belief.

FRANK GRAYSON

Subscribed and sworn to before me this 1st day of November, 1954.

.....
Notary Public

My Commission expires: .....

480 *(General Counsel's Exhibit 1-G)*

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SIXTEENTH REGION

Case No. 16-CC-48

In the Matter of

LODGE 850, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL

and

AMERICAN IRON AND MACHINE WORKS COMPANY

Complaint

It having been charged by American Iron & Machine Works Company, 518 North Indiana Avenue, Oklahoma City, Oklahoma, hereinafter referred to as American Iron, under date of September 24, 1954, that Lodge 850, International Association of Machinists, AFL, 617 Southwest 29th Street, Oklahoma City, Oklahoma, hereinafter referred to as Respondent Machinists, has engaged in and is engaging in certain unfair labor practices affecting commerce as set forth and defined in the Labor Management Relations Act, 61 Stat. 161, hereinafter referred to as the Act, the General Counsel for the National Labor Relations Board, hereinafter referred to as the Board, by the Regional Director for the 16th Region of the Board, hereby alleges as follows:

1. Respondent Machinists is a labor organization within the meaning of Section 2, Subsection (5) of the Act.

481 2. American Iron is and has been at all times material hereto a corporation duly existing by virtue of the laws of the State of Oklahoma, having its principal office and place of business at 518 North Indiana Avenue, Oklahoma City, Oklahoma, and maintaining two other places of business, 601 North Indiana, and 901 South High

Avenue, Oklahoma City, Oklahoma, and is now, and has been at all times herein mentioned continuously engaged at said places of business in the manufacture of oil field equipment.

3. American Iron in the course and conduct of its business operations during the past 12-month period, which period is representative of all times material hereto, manufactured, sold and shipped oil field equipment valued in excess of $1,000,000.00 from its Oklahoma City plants to points outside the State of Oklahoma.

4. A copy of the charge hereinabove referred to was served on the Respondent Machinists by registered mail on September 28, 1954, a copy of which is attached hereto as "Exhibit A" and made a part hereof.

5. At all times material hereto Gillette Motor Transport, Inc., herein called Gillette; D. C. Hall Transport, Inc., herein called Hall; Lee Way Motor Freight Lines, herein called Lee Way; Santa Fe Trails Transportation Company, herein called Santa Fe, and Time, Inc., herein called Time, were common carriers for hire engaged in the business of hauling freight by motor vehicle under license from the Interstate Commerce Commission. Each of said common carriers maintain terminals, docks or loading facilities in Oklahoma City, Oklahoma, where they accept, load and unload freight. Each of said common carriers also maintain terminals, docks and loading facilities in other states of the United States where they accept,
482 load and unload freight, and are engaged at all such places in the business of transporting freight by said motor vehicles in and between various states of the United States. Such common carriers commonly carry freight for American Iron.

6. Since on or about September 15, 1954, Respondent Machinists, the collective bargaining representative of American Iron production and maintenance employees, has

been engaged in a strike at the three American Iron premises in Oklahoma City as set forth in Paragraph 2, concerning terms and conditions of employment of American Iron production and maintenance employees. In connection with said strike, the Respondent Machinists has freely picketed at the three American Iron places of business located at Oklahoma City as set forth in Paragraph 2, where the employees work that Respondent Machinists represents.

7. At no time material hereto has Respondent Machinists been the collective bargaining representative of any employees of American Iron who have picked up freight for American Iron at the aforesaid common carrier's places of business or delivered freight of American Iron to the said common carriers for transportation. There is no dispute between Respondent Machinists and American Iron concerning the wages, hours or other terms or conditions of employment of such employees of American Iron.

8. In furtherance of its dispute with American Iron referred to in Paragraph 6 above, Respondent Machinists, since on or about September 15, 1954, has followed American Iron's trucks, driven by employees not within the bargaining unit represented by Machinists, to the docks, terminals and loading facilities of the aforementioned common carriers named above in Paragraph 5 and has maintained a picket or pickets at said common carriers' premises while the trucks of American Iron were present. Coincident with the maintaining of the picket or pickets on the carriers' premises, Respondent Machinists by and through its Business Agent, Ed Foster, and its pickets, orally requested employees of the aforesaid carriers to refuse to accept, check, load or unload or otherwise handle the freight tendered to the carriers by American Iron for shipment at the respective carriers' docks.

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9. On or about September 16, 1954, Respondent Machinists by and through its Business Agent, Ed Foster, induced and encouraged employees of Time to fail and/or refuse to receive, check or otherwise handle American Iron freight by threatening an employee of Time with the loss of his Teamsters' union card, if he received, checked or otherwise handled the American Iron freight, and thereby caused the said Time employee to fail and/or refuse to receive, check or otherwise handle American Iron freight.

10. On or about September 17, 1954, Respondent Machinists maintained a picket on the premises of Lee Way during the time an employee of American Iron was present on Lee Way premises delivering an American Iron freight shipment with his private car and a trailer.

11. On or about September 18, 1954, Respondent Machinists, by and through one of its American Iron picket captains at American Iron premises, requested an employee of Santa Fe to see that Santa Fe employees did not handle American Iron freight.

12. By the conduct set forth in Paragraphs 8, 9, 10 and 11 above, Respondent Machinists, since on or about September 16, 1954, has engaged in, and by picketing,
484 orders, instructions, directions, appeals and other means, has induced and encouraged the employees of Gillette, Hall, Lee Way, Santa Fe, and Time to engage in strikes or concerted refusals in the course of their employment to use, manufacture, transport, or otherwise handle or work on goods, articles, materials, or commodities or to perform services.

13. An object of Respondent Machinists' conduct set forth in Paragraphs 8, 9, 10, 11 and 12 above was and is to force or require Gillette, Hall, Lee Way, Santa Fe, and Time to cease using, handling, transporting, or otherwise dealing in the products of American Iron and to cease doing business with American Iron.

14. By the acts described above in Paragraphs 8, 9, 10, 11, and 12 and for the reasons set forth above in Paragraphs 12 and 13, Respondent Machinists did engage in and is thereby engaging in unfair labor practices within the meaning of Section 8 (b) (4) (A) of the Act.

15. By the acts described above in Paragraphs 8, 9, 10, 11, and 12 for the reasons set forth above in Paragraphs 12 and 13 and by each of said acts the Respondent did restrain and coerce and is restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act and did thereby engage in and is thereby engaging in unfair labor practices within the meaning of Section 8 (b), Subsection (1) (A) of the Act.

16. The activities of the Respondent Machinists described above in Paragraphs 8, 9, 10, 11 and 12, occurring in connection with the operations of the employer described above in Paragraphs 2 and 3 and in connection with the operations of the employers described in Paragraph 5 above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and ob-
485 structing commerce and the free flow of commerce.

17. The acts of the Respondent Machinists described above constitute unfair labor practices affecting commerce within the meaning of Section 8 (b), Subsections (1) (A) and (4) (A), and Section 2, Subsections (6) and (7) of the Act.

WHEREFORE, the General Counsel of the National Labor Relations Board has caused this Complaint to be signed and issued by the Regional Director for the Sixteenth Region on this 23rd day of October, 1954, against Lodge 850, International Association of Machinists, AFL, Respondent herein.

EDWIN A. ELLIOTT
Edwin A. Elliott, *Regional Director*
National Labor Relations Board
Sixteenth Region

(Seal)

497 (*General Counsel's Exhibit 1-M*)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SIXTEENTH REGION

Case No. 16-CC-47

In the Matter of

GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 886, AFL

and

AMERICAN IRON AND MACHINE WORKS COMPANY

Case No. 16-CC-48

In the Matter of

LODGE 850, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL

and

AMERICAN IRON AND MACHINE WORKS COMPANY

Motion for Bill of Particulars

Lodge No. 850, International Association of Machinists, A.F.L.,[1] moves the National Labor Relations Board[2] to direct the General Counsel of the Board, by the Regional Director for the Sixteenth Region, to furnish the Union with a Bill of Particulars on the allegations of the Complaint issued in the subject case.

Under date of October 23, 1954, the General Counsel, by the Regional Director, issued and caused to be served upon the Union, a Complaint alleging that the Union had engaged in certain unfair labor practices under the provisions of the National Labor Relations Act of 1947, 61 Stat. 161. The allegations of the Complaint do not set

[1] Hereinafter referred to as the Union.

[2] Hereinafter referred to as the Board.

forth the alleged conduct of the Union with sufficient particularity to enable the Union to know what particular conduct is complained of, to enable it to adequately prepare in defense of such allegations at the hearing called for in the Notice of Hearing accompanying the Complaint, and to prepare an Answer to the Complaint.

498. For these reasons the Union hereby moves for a Bill of Particulars to the allegations of the Complaint as follows:[3]

7. State the name and job classification of each employee of the American Iron and Machine Works Company who allegedly has picked up freight for the American Iron and Machine Works Company at the premises of the common carrier listed in Paragraph 5 of the Complaint or delivered American Iron freight to said common carrier's premises. Also state the date of each alleged pickup or delivery of freight as to each said employee, where each pickup and each delivery of freight was made, and the particulars thereof.

8. State the names of each individual who allegedly followed the American Iron and Machine Works Company trucks and the dates on which the alleged occurrences took place, which carrier the trucks drove to, and the circumstances thereof. Also state the names and job classifications of the employees to whom Ed Foster, Business Agent and pickets of the Union, allegedly directed oral requests that they refuse to accept, check, load or unload or otherwise handle the freight tendered to the carriers by the American Iron and Machine Works Company for shipment. Also state the date each said alleged request was made, where each took place, and the particulars thereof. Also state the names of each Union picket who allegedly made such requests, together with the date, place, and circumstances under which such alleged requests were made.

[3] The numbers used in this Motion refer to paragraph numbers as they appear in the Complaint.

9. State the names and job classifications of the employees of the Time Company who Business Agent Ed Foster allegedly induced and encouraged to fail and/or refuse to receive, check or otherwise handle American Iron freight. Also state the place where each such alleged inducement took place and the particulars thereof.

10. State the name and job classification of the American Iron employee who was allegedly delivering freight of American Iron and Machine Works with his private car and trailer. Also state where this alleged picketing took place and the particulars thereof.

499 11. State the name of the picket captain who allegedly requested an employee of Santa Fe to see that Santa Fe did not handle American Iron freight. Also state the name of the employee of Santa Fe to whom this alleged request was made and his job classification, and the particulars thereof.

12. State the dates, names of the Union representatives, names, job classifications, and employers of the persons induced, and the place and circumstances of alleged picketing, orders, instructions, directions, appeals and other means by which respondent Machinists have induced, and encouraged the employees of Gillette, Hall, Lee Way, Santa Fe, and Time to engage in strikes or concerted refusals in the course of their employment to use, manufacture, transport, or otherwise handle or work on goods, articles, materials, or commodities or to perform services.

14. State how and in what manner precisely, by the acts referred to in this paragraph, the Union committed unfair labor practices within the meaning of Section 8 (b) (4) (A) of the Act, as alleged in this paragraph, specifying names, places, dates and the particulars thereof.

15. State how and in what manner precisely, by the acts referred to in this paragraph, the Union committed unfair labor practices within the meaning of Section 8 (b) (1) (A)

of the Act, as alleged in this paragraph, specifying names, places, dates and the particulars thereof.

16. State how and in what manner precisely the activities of the Union have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and free flow of commerce.

17. State how and in what manner precisely by the alleged acts referred to in this paragraph the Union committed unfair labor practices within the meaning of Section 8 (b), Subsection (1) (A) and (4) (A), and Section 2, Subsection (6) and (7) of the Act.

The Union hereby requests the time for filing an answer to this Complaint be extended in a reasonable time after the motion for this Bill of Particulars is ruled on, and the requested information has been submitted.

Respectfully submitted,

LOUIS P. POULTON

Louis P. Poulton, GWC

Attorney for and in behalf of Lodge No. 850, International Association of Machinists, AFL.

Dated: October 27, 1954

505 *(General Counsel's Exhibit 1-R)*

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SIXTEENTH REGION

Case No. 16-CC-47

In the Matter of

GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 886, AFL

and

AMERICAN IRON AND MACHINE WORKS COMPANY

Case No. 16-CC-48

In the Matter of

LODGE 850, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL

and

AMERICAN IRON AND MACHINE WORKS COMPANY

Response to Motion for Bill of Particulars

A Motion for Bill of Particulars having been filed with the Regional Director for the Sixteenth Region of the National Labor Relations Board and the Chief Trial Examiner of the National Labor Relations Board, and said motion having been referred to Trial Examiner Sidney Feiler, for ruling pursuant to the applicable rules and regulations of the National Labor Relations Board, and said Motion having been granted only in part in regard to two paragraphs of said Motion insofar as it requested that Respondent Machinists be furnished with the date, place and by whom oral requests as referred to in Paragraph 8 of the Complaint were made; and insofar as
506 the name or identifying description of the picket captain referred to in Paragraph 11 of the Complaint, and said Motion having been expressly denied in

all other respects, comes now Leonard L. Pickering, Counsel for General Counsel of the National Labor Relations Board, and files the following Bill of Particulars:

I.

In reply to that part of Paragraph 8 of said Motion for Bill of Particulars, which was granted by the Trial Examiner, the following oral requests to refuse to accept, check, load or unload, or otherwise handle American Iron Freight were made by the following people on behalf of the Respondent Machinists at the respective dates and places:

a. Ed Foster—On or about September 16, 1954, at the Oklahoma City terminals of the following carriers: Santa Fe, Time, Gillette, Hall, and Lee Way.

On or about September 17, 1954, at the Oklahoma City terminal of Santa Fe.

On or about September 17 or shortly thereafter at the Oklahoma City terminal of Lee Way.

b. Bob Pickett—On or about September 17, 1954, or shortly thereafter, at the Oklahoma City terminal of Lee Way.

c. George Wimberly—On or about September 16 at the Oklahoma City terminals of Santa Fe, Gillette, Time, Hall and Lee Way.

II.

In reply to that part of Paragraph 11 of said Motion for Bill of Particulars granted by the Trial
507 Examiner, the picket captain who requested an employee of Santa Fe to see that Santa Fe employees did not handle American Iron freight was a picket captain present at the American Iron premises in Oklahoma City, who was supervising the pickets at said American Iron premises on or about September 18, 1954. The said picket

captain was wearing a cap on which there was a Machinists' emblem and his name is at this time unknown to Counsel for General Counsel.

Respectfully submitted this 3rd day of November, 1954.

LEONARD L. PICKERING
Counsel for General Counsel
National Labor Relations Board
300 West Vickery
Fort Worth, Texas

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525 (*General Counsel's Exhibit 1-W*)

(Received Nov. 8, 1954)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SIXTEENTH REGION

Case No. 16-CC-47

In the Matter of

GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 886, AFL

and

AMERICAN IRON AND MACHINE WORKS COMPANY

Case No. 16-CC-48

In the Matter of

LODGE 850, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL

and

AMERICAN IRON AND MACHINE WORKS COMPANY

Lodge 850, International Association of Machinists, AFL. Answer to Complaint

Comes now Lodge 850, International Association of Machinists, AFL,[1] and in answer to the Complaint issued

[1] Hereinafter referred to as the Respondent.

under the date of October 23, 1954, admits, denies, and alleges as follows:

1. The Respondent admits it is a labor organization within the meaning of Section 2, Subsection (5) of the Act.

2. The Respondent alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 2 of the Complaint.

3. The Respondent alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 3 of the Complaint.

4. The Respondent admits, as stated in Paragraph 4 of the Complaint, that a copy of the charge in the above captioned case has been served upon its agents.

5. The Respondent alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 5 of the Complaint.

6. The Respondent admits the allegations in Paragraph 6 of the Complaint so far as they allege that on or about September 15, 1954 Respondent Machinists, the collective bargaining representative of American Iron
526 and Machine Works Company production and maintenance employees, has been engaged in a strike at the three American Iron premises as set forth in Paragraph 2, concerning terms and conditions of employment of American Iron production and maintenance employees; and in connection with said strike the Respondent Machinists have picketed at the three American Iron places of business at Oklahoma City as set forth in Paragraph 2 of the Complaint. The Respondent denies generally and specifically all other allegations contained in Paragraph 6 of the Complaint.

7. The Respondent denies generally and specifically, each and every, all and singular, the allegations in Paragraph 7 of the Complaint.

8. The Respondent denies generally and specifically each and every, all and singular, the allegations in Paragraph 8 of the Complaint.

9. The Respondent denies generally and specifically, each and every, all and singular, the allegations contained in Paragraph 9 of the Complaint.

10. The Respondent denies generally and specifically, each and every, all and singular, the allegations contained in Paragraph 10 of the Complaint.

11. The Respondent denies generally and specifically, each and every, all and singular, the allegations in Paragraph 11 of the Complaint.

12. The Respondent denies generally and specifically, each and every, all and singular, the allegations in Paragraph 12 of the Complaint.

13. The Respondent denies generally and specifically, each and every, all and singular, the allegations and conclusions in Paragraph 13 of the Complaint.

14. The Respondent denies generally and specifically, each and every, all and singular, the allegations and conclusions in Paragraph 14 of the Complaint.

15. The Respondent denies generally and specifically, each and every, all and singular, the allegations and conclusions in Paragraph 15 of the Complaint.

16. The Respondent denies generally and specifically, each and every, all and singular, the allegations and conclusions in Paragraph 16 of the Complaint.

17. The Respondent denies generally and specifically, each and every, all and singular, the allegations and conclusions in Paragraph 17 of the Complaint.

527 18. The Respondent further denies generally and specifically, that it has in any way violated either Section 8 (b) (1) (A) and (4) (A) of the Act, or both.

19. The Respondent denies that the facts set forth in the Complaint, constitute unfair labor practices within the meaning of Section 8 (b), Subsection (1) (A) and (4) (A), and Section 2, Subsection (6) and (7) of the Act.

Respectfully submitted,

LOUIS P. POULTON
Louis P. Poulton, *Attorney*
For and in behalf of Lodge 850,
International Association of
Machinists, AFL

Dated at Washington, D. C.
November 5, 1954.

DISTRICT OF COLUMBIA, ss

Subscribed and sworn to before me, John A. Hammer, Notary Public, in and for the District of Columbia, residing therein, duly commissioned and sworn to this 5th day of November, 1954.

JOHN A. HUMMER
John A. Hummer
Notary Public for the
District of Columbia

(Seal)

590 UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

Case No. 16-CC-47

GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION LOCAL NO. 886, AFL

and

AMERICAN IRON AND MACHINE WORKS COMPANY

Case No. 16-CC-48

LODGE 850, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL

and

AMERICAN IRON AND MACHINE WORKS COMPANY

Leonard L. Pickering, Esq., for the General Counsel.

Frank Grayson, Esq., Oklahoma City, Okla., for the Respondent Teamsters.

Louis P. Poulton, Esq., Washington, D. C. and Mr. Steven E. Williams, Fort Worth, Tex., for the Respondent Machinists.

Everett E. Cotter, Esq., Oklahoma City, Okla., for the Charging Prty.

Before: Sidney L. Feiler, Trial Examiner.

Intermediate Report and Recommended Order

STATEMENT OF THE CASE

Upon a charge filed by American Iron and Machine Works Company, herein referred to as American Iron, the General Counsel of the National Labor Relations Board[1] by

[1] The General Counsel and the attorney representing him at the hearing are referred to as the General Counsel. The National Labor Relations Board is referred to as the Board.

the Regional Director for the Sixteenth Region (Fort Worth, Texas), on October 23, 1954, issued a complaint against Lodge 850, International Association of Machinists, AFL, herein referred to as the Respondent Machinists, alleging that the Respondent Machinists had engaged in conduct violative of Section 8 (b) (4) (A) and (1) (A) and Section 2 (6) and (7) of the National Labor Relations Act, as amended, 61 Stat. 136, 65 Stat. 601, herein referred to as the Act. Copies of charge, complaint and notice of hearing were served upon the parties to the proceeding.

With respect to unfair labor practices the complaint alleges in substance that from on or about September
591 15, 1954, the Respondent Machinists, in furtherance of a dispute it had with American Iron concerning terms and conditions of employment of employees at American Iron whom it represented and, in violation of the Act, followed trucks of American Iron to loading docks of certain motor freight common carriers, picketed American Iron trucks while on premises of these common carriers, and requested their employees not to handle American Iron freight.

The Respondent Machinists in its answer dated November 5, 1954, admits certain jurisdictional allegations, but denies the commission of any unfair labor practices. Prior to the filing of its answer, the Respondent Machinists filed a motion for bill of particulars which was granted, in part, by the undersigned.

Another complaint was issued by the Regional Director on October 23, 1954, against General Drivers, Chauffeurs, Warehousemen and Helpers Union, Local No. 386, AFL, herein referred to as Respondent Teamsters, based upon a charge and amended charge filed by American Iron. With respect to unfair labor practices, this complaint alleges in substance that the Respondent Teamsters, while collective bargaining representative of dock employees at certain motor freight common carriers, had induced, encouraged,

and instructed, these employees not to handle American Iron freight, in violation of the Act. Copies of the charges, complaint, and notice of hearing were served upon the parties to this proceeding.

The Respondent Teamsters in it answer, dated November 1, 1954, admits virtually all the allegations of the complaint, except those of a conclusionary nature and affirmatively alleges that its activities "have been directed to the sole purpose of complying with its contract governing the situation, with the employers involved herein . . . ."

Prior to the hearing both of the above cases were consolidated for the purpose of trial. Pursuant to notice a hearing was held at Oklahoma City, Oklahoma before the undersigned Trial Exami r. All parties were represented at the hearing and were afforded full opportunity to be heard and to examine and cross-examine witnesses.

At the outset of the hearing, counsel for both Respondents moved to dismiss the complaint on the grounds that a collective bargaining contract executed by American Iron and the Respondent Machinists plus the cessation of the strike and picketing rendered the "controversy" moot. This motion was denied.

The undersigned granted motions by the General Counsel to amend the complaint issued against the Respondent Teamsters by adding two additional allegations of conduct alleged to be violative of the Act. Respondent T amsters amended its answer to include denials of these allegations.

The General Counsel also moved to amend the complaint issued against Respondent Machinists by alleging an additional picketing incident claimed to be violative of the Act. This motion was granted. The Respondent Machinists amended its answer to include a denial of the additional allegation and also to admit certain allegations of the complaint, previously denied.

At the conclusion of the presentation of evidence by the General Counsel, the Respondent Machinists moved to dismiss portions of the complaint, as amplified in the bill of particulars, and the entire complaint itself for failure of proof. The Respondent-Teamsters also moved to dismiss the complaint against it insofar as it alleges that the Respondent Teamsters by threats induced certain dock employees to refuse to handle American Iron freight and that it has encouraged employees of certain carriers to engage in strikes. Decision was reserved on these
592 motions and on their renewal at the close of the presentation of evidence. They are disposed of by the findings and recommendations herein. The General Counsel then moved to conform the pleadings to the proof as to formal matters. This motion was granted as to all pleadings without objection. Opportunity was then afforded for oral argument. However, except for a statement of position by the Respondent Teamsters, there was a waiver by all parties. Opportunity was also afforded for the filing of briefs and/or proposed findings of fact or conclusions of law or both. Briefs were received from the General Counsel, the Respondent Machinists, and the Respondent Teamsters.

Upon the entire record and from his observation of the witnesses the undersigned makes the following:

FINDINGS OF FACT

I. The Business of the Companies

American Iron and Machine Works Company is and has been at all times material hereto a corporation existing by virtue of the laws of the State of Delaware, having its principal office and place of business in Oklahoma City, Oklahoma. It is now and has been at all times herein mentioned engaged at its principal office and two other places of business in Oklahoma City in the manufacture of oil field equipment.

American Iron in the course and conduct of its business operations during the past 12-month period, which period is representative of all times material hereto, manufactured, sold and shipped oil field equipment valued in excess of $1,000,000 from its Oklahoma City plants to points outside Oklahoma. The undersigned finds that at all times herein relevant American Iron was and is engaged in commerce within the meaning of the Act.

At all times material herein Gillette Motor Transport, Inc., herein called Gillette; D. C. Hall Transport, Inc., herein called Hall; Lee Way Motor Freight Lines, herein called Lee Way; Santa Fe Trails Transportation Company, herein called Santa Fe; and Time, Inc., herein called Time; were common carriers for hire engaged in the business of hauling freight by motor vehicle under license from the Interstate Commerce Commission. All of these common carriers maintain terminals, docks or loading facilities in Oklahoma City where they accept, load and unload freight. They also maintain terminals, docks and loading facilities in other States of the United States where they accept, load and unload freight, and are engaged at all such places in the business of transporting freight by motor vehicles in and between various States of the United States. These common carriers commonly transport freight for American Iron.

II. The Labor Organizations Involved

Lodge 850, International Association of Machinists, and General Drivers, Chauffeurs, Warehousemen and Helpers Union, Local No. 886, are affiliated with the American Federation of Labor and are labor organizations within the meaning of the Act.

III. The Unfair Labor Practices

A. The defense of mootness

The Respondent Machinists, in its brief, renewed its motion made at the outset of the hearing to dismiss the complaint because, it contends, the controversy has been rendered moot by the existence of a collective bargaining contract executed by it and American Iron which contract contains a no-strike clause. Also, the strike with the attendant picketing has been terminated. The Respondent Teamsters joins in this motion.

593 The undersigned finds that these developments have not rendered the present proceedings moot. Orders dealing with unfair labor practices have preventative as well as remedial purpose and effect.[2] The voluntary cessation of unfair labor practices or private agreements for their end do not deprive the Board of its power to add the sanction of a Board order and possibly enforcement proceedings in order to bar any recurrence of those practices.[3]

B. Activities of the respondent machinists

1. Picketing Activities

The Respondent Machinists was and is the collective bargaining representative of production and maintenance employees at American Iron. On September 13, 1954[4] the Respondent Machinists declared a strike against the Company. This strike lasted until October 21, 1954, when a new collective bargaining agreement was reached. The Respondent Machinists had unobstructed access to picket the three premises of American Iron during the entire period of the strike and did maintain picket lines at those premises.

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[2] American Sheet Metal Works, 106 NLRB No. 24.

[3] N.L.R.B. v. Mexia Textile Mills, Inc., 339 U.S. 563, 567; N.L.R.B. v. Spitzer Motor Sales, Inc., 211 F. 2d 235 (C.A. 2); N.L.R.B. v. F. H. McGraw & Co., 206 F. 2d 635, 641 (C. A. 6).

[4] All dates mentioned are in 1954 unless the contrary is indicated.

Customarily all company freight shipments and deliveries were picked up and delivered at American Iron premises by agents of the freight carriers. A company truck was sent to the loading docks of these carriers only on special occasions. During the strike the situation was reversed and a company truck was used to haul shipments to the loading platforms of the carriers. The truck used, except on one occasion, was one bearing identification as an American Iron truck. The trucking was done by employees who were not represented by the Union and whose regular work did not include freight hauling.

The Union extended its picketing to include the truck operations away from American Iron premises. When a truck would leave company premises, it would customarily be followed by a car containing one or more pickets and another union representative. The truck would be driven to a loading dock. One or two machinists pickets would leave their car, don picket aprons, and picket close to the truck in a U-shape path. This picketing would be continued until the truck was driven from the premises of the carrier. Then the pickets would leave.

The picket aprons were white garments bearing the following legend:

I A of M
MACHINIST
850

(the above was in blue letters 1¾" high)

ON
STRIKE

(the above was in red letters 2½" and 3" high)

A F of L

(blue letters 1½" high)

(There is disagreement whether the following words in blue letters in script ½" high approximately 9" below the "AF of L" letters appeared on the bottom of the aprons)

594 We Do Not Ask Anyone to Cease Work

This point of disagreement will be treated later in this report.

Contentions of the parties; conclusions

Section 8(b) (4) (A) provides, in part, that it shall be an unfair labor practice for a labor organization to induce or encourage the employees of any employer to engage in a strike or concerted refusal in the course of their employment to handle any goods where an object thereof is to force an employer to cease handling the products of any other manufacturer or to cease doing business with any other person. This section "proscribes picketing at the separate premises of employers who are not a party to the picketing union's primary labor dispute."[5]

There was such picketing here. The Respondent Machinists argues that its conduct was permissible primary picketing since it only picketed around the American Iron truck while it was on the premises of the carriers who were neutral parties to the dispute.[6]

However, the Board has ruled that ambulatory picketing is permissible only if the actual situs of the dispute is on the premises of a secondary employer and the primary employer has no permanent establishment where picketing can reasonably take place.[7] Where these two factors are not present, trucks of the primary employer may not be picketed on the premises of a secondary employer even though such picketing is confined to the immediate area of a truck, the pickets carry signs clearly indicating they have a dispute only with the primary employer, and they picket only as long as the truck of the primary employer are on the prem-

[5] Brewery and Beverage Drivers and Workers Local No. 67, etc. (Washington Coca Cola Bottling Works, Inc., 107 NLRB No. 104, p. 5).

[6] Schultz Refrigerated Service, Inc., 97 NLRB 502; Moore Drydock Company, 92 NLRB 547.

[7] Washington Coca Cola Bottling Works, Inc., 107 NLRB 104; Thurston Motor Lines, Inc., 110 NLRB No. 122.

isses of the secondary employer.[8] Since the Respondent Machinists had full opportunity to picket the three places of business of American Iron in Oklahoma City and did so throughout the strike, its picketing at the premises of the freight carriers in Oklahoma City, under the above decisions, was not permissible picketing under the ambulatory situs doctrine. In view of this finding it is unnecessary to deal with the additional contentions of the General Counsel that the Respondent Machinists cannot resort to the ambulatory situs doctrine because the situs of the dispute was not on the premises of the common carriers,[9] the picket aprons worn by the roving pickets did not identify American Iron as the employer with whom the Union had its dispute, and that these pickets on one occasion picketed an American Iron truck which had no identifying designation.

While there is considerable dispute among the witnesses whether the words, "We Do Not Ask Anyone to Cease Work," appeared on the picket aprons worn by the roving pickets,[10] their use would not constitute a valid defense under the circumstances of this case.

Edd C. Foster, business representative of the Respondent Machinists, testified that one of the purposes of the

[8] Sales Drivers, Helpers & Building Construction Drivers, Local Union 859, etc., Associated General Contractors of America, Georgia Branch, 110 NLRB No. 274.

[9] See, Gotham Broadcasting Company, 110 NLRB No. 260.

[10] Robert Pickett, a picket captain testified that the words did not appear on any of the picket aprons for the first two days of the strike, but that they were on the aprons used by the roving pickets thereafter.

The General Counsel produced two American Iron employees who were regularly used as helpers on the American Iron truck generally used to make deliveries to the carriers during the strike, James Gray and Cleve Dodd. Dodd was not sure whether the words in question appeared on the picket aprons of the roving pickets. Gray testified that the words were not on the aprons he saw until after a court hearing on October 16. Two other witnesses were not certain about it and one, William B. Jones, testified that when he made a delivery for the Company on September 17, the words were not on the apron worn by a picket. This was on a date when, according to Pickett, the picket aprons did not have the statement on it.

picketing was to cause the employees of the carrier to refuse to get on American Iron equipment and unload shipments. As he put it at one point in his testimony:

> Any place any time that we picketed the American Iron or American Iron equipment, which I feel is a part of American Iron, is an integral part of American Iron, I hope they wouldn't get in the trucks or otherwise handle or do business and do our people's work, certainly I hoped that no one would do our work while we were on strike. We were not fortunate enough, of course, to keep that from happening.

It is clear from all the circumstances of this case that the picketing was intended to do more than advertise the existence of a strike. It was intended to disrupt the business relations between American Iron and the freight carriers. The evidence establishes that these efforts were successful. The words on the bottom line of the picket apron, so small as to be hardly distinguishable a few feet away, cannot serve to blunt the purpose and effect of the picketing. Their use does not constitute a valid defense.

Finally, the Respondent Machinists contends that since the Respondent Teamsters and the secondary employers herein, the freight carriers, were parties to a uniform contract containing a "hot cargo" clause providing that "members of the Union shall not be allowed to handle or haul freight to or from an unfair company provided this is not a violation of the Labor Management Relations Act of 1947." (Art. 4 (b)), an essential ingredient to a finding of a violation of Section 8 (b) (4) (A) is lacking because the handling of American Iron freight by the employees of the carriers was not "in the course of their employment." It asserts that the Respondent Teamsters' members could honor the ambulatory picket line of the Respondent Machinists without violating the Act and it therefore follows that the Respondent Machinists' conduct of notifying the members of the Respondent Teamsters that the American Iron

Company was an unfair company could not constitute encouragement or inducement of the Teamster members to engage in a concerted refusal in the course of their employment to handle the goods of another employer.

The validity of the activities of the Respondent Teamsters will be dealt with in another section of this Report. However, the undersigned is of the opinion that the conduct of the Respondent Machinists must be evaluated independently of that of the Respondent Teamsters and that the defenses, if any, available to the latter are not thereby automatically available to the former. Despite the absolute language of the "hot cargo" clause in the Teamsters uniform contract, the proof shows that after picketing of American Iron trucks began while they were on the premises of the common carriers, dock employees of at least some of those carriers continued to handle American Iron merchandise. Indeed, in some instances there were protests when supervisory employees attempted to move merchandise that would normally be moved by the dock employees, members of the Respondent Teamsters. Actually, none of the common carriers informed their employees that they
596 could not handle American Iron freight. In most instances, the dock employees continued to handle American Iron freight until instructed by representatives of their union not to do so. It has been held that a hot cargo clause may constitute a valid defense to a Section 8 (b) (4) (A) complaint, in certain instances, when the defense is raised by a labor organization which is a party to the contract.[11] However, in the instant case, the Respondent Machinists had no connection with the contract. Under all the above circumstances, it is found that the Teamsters contract could not constitute the basis for a defense by the Respondent Machinists. It is further con-

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[11] Rabouin d/b/a Conway's Express, 87 NLRB 972, enf'd. 195 F. 2d 906 (C. A. 2); Chauffeurs, Teamsters, Warehousemen and Helpers Local Union No. 135, etc., (Pittsburgh Plate Glass Company), 105 NLRB 740.

cluded that the ambulatory picketing of the American Iron trucks by the Respondent Machinists, for the reasons set forth above, was violative of Section 8 (b) (4) (A) of the Act.

2. Oral requests and threats

The complaint alleges that the Respondent Machinists orally requested employees of the freight carries to refuse to handle American Iron freight tendered for shipment at their docks, threatened a carrier employee with loss of his Teamsters' union card if he handled American Iron freight, and requested a carrier employee to see that his fellow employees did not handle American Iron freight. The Respondent Machinists denies these allegations. The evidence of these alleged activities at the premises of the freight carriers is as follows:

Santa Fe

James Gray, an American Iron employee who acted as helper on a company truck during the strike, testified that on September 15 or 16 he heard Edd Foster, the business representative of the Respondent Machinists, ask James Smith, freight agent of Santa Fe, whether he would accept an American Iron shipment. Smith replied that he had to and the shipment was accepted. Gray could not recall any further details about this conversation. The undersigned finds that this inquiry to a supervisory employee, even if it could have been overheard by rank-and-file employees was not in and of itself violative of the Act.

Clifford M. Troxel, a truck driver and a Teamster steward at Santa Fe, testified that he spoke with an American Iron picket captain, later identified as Robert Pickett, across the street from an American Iron plant while picketing was in progress there. During the conversation, according to Troxel, Pickett said, "Well, I hope you boys observe our picket and help us out," and not handle American Iron freight. Troxel testified that he understood Pickett's

reference to observing a picket line to refer to the one across the street, but that when Pickett raised the issue of not handling American Iron freight in general, Troxel got into a discussion with him as to whether a secondary boycott would result in such tactics.

Pickett denied that he asked Troxel not to handle American Iron freight but testified that they did discuss the roving picket tactics adopted by the Respondent Machinists and, on this point, Pickett referred Troxel to Foster for further information. He testified that there was further discussion which he could not recall, but did remember Troxel volunteering that his men would "stick" with the Machinists during the strike.

The undersigned found Troxel's version of the conversation more clear, logical and credible than Pickett's,
597 particularly since both agreed that there had been discussion of American Iron deliveries at the Santa Fe loading docks and problems in connection with the receipt of those deliveries. The undersigned, therefore, concludes the urging of Pickett, himself a picket captain in charge of the conduct of the roving pickets and also those at the places of primary picketing, that Santa Fe employees not handle American Iron freight was an attempt to cause a refusal to handle work on the part of employees of a secondary employer, in violation of Section 8 (b) (4) (A) of the Act.

Gillette

James Hancock, a driver for American Iron during the strike, testified that on one occasion, he heard Foster tell the dock foreman of Gillette that Gillette was the only freight carrier company accepting American Iron freight. Hancock spoke up and denied that this was so. Some Gillette employees were about 10 feet away, according to Hancock. His testimony was corroborated by James Gray who was acting as helper on the American Iron truck at

that time. Foster's version was that he told the foreman that some companies were accepting the freight and some were not.

The undersigned credits Hancock's testimony but finds the evidence on the full interchange and the attendant circumstances too fragmentary to warrant a finding that under all the circumstances Foster's remark was violative of the Act.

Time

Gray testified that on September 15 or 16 while an American Iron delivery was being made at Time, he observed Foster talking to a dock hand, and heard part of the conversation in which Foster said "something about this dock hand would lose his union card or his place in the union, or something to that effect." Gray heard nothing else of the conversation and was 25 or 30 feet away from the pair. Foster denied threatening any Time employee by making the above threats. The undersigned found Gray's testimony on this point too incomplete to warrant a finding against the Respondent Machinists.

Foster testified that he did tell the dock steward at Time that he had a picket on a "hot" load of material. Hancock testified that he heard Foster thank a dock steward and then the steward refused to sign for American Iron freight. While Foster testified that his purpose in talking to the steward was to assure him that there was no strike against Time itself, the undersigned finds that this remark to the union representative of the Time dock employees was an inducement or encouragement of these employees to cease handling American Iron shipments and was violative of Section 8 (b) (4) (A) of the Act.

Hall

Gray testified that on September 15 or 16 when a Hall dock employee attempted to get on an American Iron truck to help unload, Foster who was about 10 or 15 feet

away sitting in his car called out to the man not to help unload the truck. The man backed away from the truck. On another occasion, about a week later, according to Gray, when an effort was being made to make an American Iron delivery at Hall, a dock workman asked Foster what he was doing for the good of the country. When Foster replied that he was trying to raise the wages of workingmen, the man said he would help Foster.

Foster testified that he could not recall any particular conversation at Hall's. The undersigned credits Gray's testimony and finds that Foster's direction to a Hall employee not to help unload an American Iron truck was violative of the Act.

598 *Lee Way*

William Hall, dock steward at Lee Way testified that on or about September 20 an American Iron truck was picketed on Lee Way premises by two pickets while making a delivery. After the driver had driven away, one of the pickets, Robert Pickett, went on the loading platform, and went up to Hall after several employees had pointed him out. Pickett, according to Hall, wanted to know who had signed for the freight. Hall replied that probably a management employee had signed. Pickett asked whether the Lee Way employees would recognize the Machinist picket line. Hall replied that this was a new situation, but he would try to find out the right thing to do. Pickett then remarked that the employees should not handle American Iron freight in the future.

Pickett testified that he merely asked Hall who had signed for the freight and Hall did not give him the information.

The undersigned found Hall's testimony reliable and has credited it. Pickett held a responsible position in the strike organization as a picket captain. His remarks to Hall were violative of the Act and the Respondent Machinists is chargeable with responsibility for Pickett's conduct.

B. ACTIVITIES OF THE RESPONDENT TEAMSTERS

The complaint against the Respondent Teamsters consists of 29 paragraphs. Of these, the first 20 have been admitted by the Respondent Teamsters. It is undisputed that this Respondent at all times material was the collective bargaining representative of the dock employees and drivers at the 5 motor freight common carriers listed in the complaint. On the other hand, this Respondent has not, at any time material, represented employees at American Iron nor has it had a labor dispute with American Iron or any of the common carriers.

As to the activities of the Respondent Teamsters during the strike of the Respondent Machinists at American Iron, it is undisputed that at four of the carriers Santa Fe, Gillette, Hall, and Time, the Respondent Teamsters induced and encouraged the dock employees, members of its union, by appeals and instructions not to handle American Iron freight. There is only dispute as to certain details and the situation at Lee Way.

The Respondent Teamsters, while admitting most of the allegations in the complaint maintains that its activities were directed "to the sole purpose of complying with its contract governing the situation with the employers involved herein . . .," and thus was not violative of the Act. It places its reliance on the Conway case in which certain action in protection of a hot goods clause was found not violative of the Act.[12] The General Counsel maintains that the Conway case is distinguishable from the facts in the instant case.

The Respondent Teamsters at all times here relevant had an identical contract with each of the five common carriers. This contract contains the following hot cargo provision:

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12 Rabouin d/b/a Conway's Express, 87 NLRB 972, enf'd. 195 F. 2d 906 (C.A. 2).

ARTICLE 4

Picket Line—

(a) The Union and the Employer agree that it shall not constitute a breach of this Agreement for any employee or Union Member covered herein to refuse to cross a picket line or to refuse to enter upon the premises of an Employer if such refusal does not constitute a violation of the Labor Management Relations Act of 1947.

599 (b) Members of the Union shall not be allowed to handle or haul freight to or from an unfair company, provided, this is not a violation of the Labor Management Relations Act of 1947.

Definition of Employees Covered—

(c) The term "employee" or "driver" or "chauffeur" shall be construed to mean the operator of a truck, tractor, motorcycle, passenger, horsedrawn vehicle, or any other vehicles used for transportation purposes and shall also include employees engaged in delivery service on foot or bicycle, or by similar methods when used to defeat the purpose of this Agreement.

In the Conway case, the Board considered the validity of the following two hot cargo clauses:

The Union reserves the right to refuse to handle goods from any firm or truck which is engaged in any controversy with this or any other Union.

The Union reserves the right to refuse to accept the freight from or to make pick-ups from or deliveries to establishments where picket lines, strikes, walkouts and lock-outs exist.

It made the preliminary finding:

In reliance on this contractual provision, Respondent's shop stewards at each of the three establishments ceased handling Conway's freight upon being advised by the Re-

spondent's office that the Conway strike was "on". And each of the employers, apparently mindful of its contractual obligation, acquiesced in its employees' refusal to handle the "hot" cargo.

It then held:

It is evident from these facts that the three secondary employers, in effect, consented in advance to boycott Conway's. As they consented, their employees' failure to deliver freight to or accept freight from Conway trucks was not in the literal sense a "strike" or "refusal" to work, nor was any such concerted insubordination contemplated by the Respondent when it caused the employees to exercise their contractual privilege. In the circumstances, Section 8 (b) (4) (A) cannot apply, unless we accept the General Counsel's argument that the "hot cargo" contracts were repugnant to the policy of the amended Act and therefore invalid after the effective date of the 1947 amendments. But we find no merit in this argument. Section 8 (b) (4) (A) of the Act prohibits labor organizations from "enforcing or requiring" the participation of neutral employers in secondary boycotts by the use of certain forms of employee pressure, namely, strikes or work stoppages (either actually engaged in, or "induced" or "encouraged" by the Union). This section does not prescribe other means by which unions may induce employers to aid them in effectuating secondary boycotts; much less does it prohibit employers from refusing to deal with other persons, whether because they desire to assist a labor organization in the protection of its
600 working standards, or for any other reason. An employer remains free, under that section of the amended Act, as always, to deal with whatever firms, union or nonunion, he chooses. And by the same token, there is nothing in the express provisions or underlying policy of Section 8 (b) (4) (A) which prohibits an employer and a union from voluntarily including "hot cargo" or "struck

work" provisions in their collective bargaining contracts, or from honoring these provisions. That is all that happened in this case. (Footnotes omitted)

The General Counsel argues that the Conway case is not determinative of the issues here because (1) In two instances in the Conway case, inducement not to handle freight was addressed to those not "employees" within the meaning of the Act, and (2) At the premises of three secondary employers stewards stopped handling Conway freight when they were told by the Union that a strike against Conway was "on," while in the present case the Teamsters did much more by way of inducement, instructions, and appeals.

Finally, the General Counsel argues that in the instant case there was no acquiescence at the time to the employees refusal to handle freight whereas there was such acquiescence in the Conway case. These points will be considered further in connection with a review of cases applying the Conway doctrine.

The Board's decision in the Conway case was affirmed on review in the Court of Appeals. The Court expressly upheld the validity of the negotiation of hot cargo clauses, stating:

The union cannot have committed an unfair labor practice under this section in regard to those employers who refused to handle Rabouin's shipments under the terms of the area agreement provisions relating to cargo shipped by struck employers. Consent in advance to honor a hot cargo clause is not the product of the union's "forcing or requiring any employer * * * to cease doing business with any other person." § 8 (b) (4) (A).

It also upheld the validity of requests to neutral employers not to accept shipments from an employer against whom a union was striking.

The Conway doctrine was applied in the case of Local Union No. 787, International Brotherhood of Teamsters, etc., (Arkansas Express, Inc.; 92 NLRB 255, in which the Board found that there had been inducement of secondary employers not to accept freight shipments, but there had been a failure of proof of pressure on secondary employees.

In the Pittsburgh Plate Glass Company case, 105 NLRB 740, the Board specifically considered the validity of direct appeals by a Union to employees of secondary employers not to handle the goods of a primary employer when the Union and the secondary employer were parties to a contract with a hot cargo clause. In this case the Board, after reviewing the evidence, found "that during the period involved herein, the Respondent engaged in, and by its instructions and other appeals, induced and encouraged the employees of various trucking carriers [the secondary employers] to engage in a concerted refusal to handle Pittsburgh [the primary employer] freight." (p. 743) It further found that with but one belated exception the employers affirmed the contracts by acquiescing in their enforcement. It then concluded:

> So, as the employers in this proceeding consented to the "unfair goods" provision of the contracts, their em-
> 601 ployees' failure to handle these goods was not a strike or concerted refusal to work under Section 8 (b) (4) (A). Nor was their employees' refusal to handle Pittsburgh freight "in the course of . . . employment" within the meaning of Section 8 (b) (4) (A) for that employment as defined by the contracts excluded from the required job duties work on "unfair goods." It cannot be said, therefore, that by causing the employees to exercise their contractual privilege, the Respondent induced a concerted refusal to work in the course of employment with an object of forcing any employer to cease doing business with any other person in violations of Section 8 (b) (4) (A). We concluded it matters not that the contracts did not

reserve to the Respondent as distinguished from the employees the right to refuse to handle "unfair goods." (page 744)

The decision in the Pittsburgh Plate Glass case was cited and followed in the case of Madden v. Local 442, International Brotherhood of Teamsters, etc., 114 F. Supp. 932, (U. S. D. C., W. D. Wis.) where an injunction was refused although the Court found that there had been inducement or encouragement of employees of secondary employers to cease handling goods of a primary employer, holding that there had been a valid exercise of the right to enforce a hot cargo clause.

In the instant case an injunction was refused on the basis that the hot cargo clause furnished a defense to a charge of violations of the secondary boycott provisions of the Act (Journal entry, Case 6428, unreported, U. S. D. C. W. D. Okla., Oct. 25, 1954).

The Board has reviewed the Conway doctrine in the case of McAllister Transfer, Inc., 110 NLRB No. 224. In the McAllister case there was an "unfair goods" clause between a union and certain freight carriers providing that it would not be a violation of the contract nor a reason for discharge for an employee to refuse to go through a picket line or refuse to handle unfair goods. An addition was later added stating that the union and its members, individually and collectively, reserved the right to refuse to handle goods of any firm engaged in a controversy with a union. It was found that there had been direct inducement by the Union involved of employees of secondary employers in aid of a labor dispute it had with McAllister. These efforts were successful even though at each of the three carriers involved a notice to employees was posted:

> Our Company is not having a labor dispute with any labor union. As a common carrier holding authorities under Federal and State laws, we are required to transport all commodities properly tendered to us.

Therefore, we direct all of our employees to handle freight received by us, without discrimination as to shippers or motor carriers who may be interlining freight with us. This includes freight which we originate and is destined beyond our line in which specific routing is furnished to us by the shipper.

Two members of the Board joined in an opinion holding that secondary employers could not waive the provisions of Section 8 (b) (4) (A) since they were specifically intended to protect the public interest. They held that the Conway doctrine should be reversed and that it should be held that hot cargo clauses do not constitute a valid defense to charges of violations of Section 8 (b) (4) (A).

Two members of the Board joined in a dissenting opinion upholding the Conway doctrine as developed in later Board and Court cases.

602 A separate concurring opinion was filed by the Chairman. He joined in the finding of a violation of the Act. However, he declared, "I do not find it necessary, or even appropriate, to overrule the Board's Conway decision, . . . nor would I go so far as to characterize the 'hot cargo' provision of the contract as being contrary to public policy." Nor, he stated would he treat the private agreement as supreme.

I doubt that public policy requires us to invalidate a hot cargo provision any more than it requires us to raise such a provision to a dignity which permits it to override other relevant facts. I will assume for the purposes of this case that the secondary employers and the union could lawfully (insofar as the Statute is concerned) contract for a hot goods provision, and they could also mutually abide by it. Moreover, I will assume that, had they done so, there would have been no showing of a violation of Section 8 (b) (4). This, I conclude, is the holding in the Conway case, and since it has court approval, I would be loathe to disturb it.

The standard the Chairman applied to the case is as follows:

I am convinced that acceptance of the Conway decision would not dispose of this case. Here, the facts which are set forth in the majority decision disclose, and the Trial Examiner found, that the Unions affirmatively induced and encouraged their members to refuse to handle McAllister freight. Since this was done in furtherance of an objective interdicted by Section 8 (b) (4), the conduct here is violative of the plain and literal language of the Section. It is impossible to say here, as in Conway, that there was no unlawful "inducement" or "refusal" on the part of the employees to handle McAllister freight. This is so for the simple reason that the secondary employees here posted notices to their employees directing them to handle all freight without discrimination. These notices were posted for the express purpose of putting employees on notice that they were expected to handle McAllister's goods when presented at the docks.

In the face of this affirmative evidence that the employees were acting contrary to explicit instructions, which was not true in Conway, I am unable to escape the conclusion that there was a clear "refusal" by the employees to handle McAllister freight.

Thus, we are confronted here with a case in which all of the elements of a violation—inducement, refusal, and unlawful objective—have been proved. The fact that one or more of these essential elements might have been lacking had the secondary employer adhered to the contract undertaking to boycott "hot cargo" is not enough to bring this case within the holding of the Conway decision. The General Counsel issued the complaint, and tried the case on the theory that this case was distinguishable from Conway, and I agree with his position. Accordingly, I concur in the finding that Respondents have violated Section 8 (b) (4) (A) and (B).

Since, in the McAllister case, there was a majority holding of a violation of Section 8 (b) (4) (A) only to the extent the limitations outlined in the Chairman's opinion were met, that standard will be applied in this case since the same basic circumstances exist here—the use of direct pressure on secondary employees with reliance on a hot cargo clause as a defense.

The hot cargo clauses in the McAllister and the instant case are similar. Both purport to give employees
603 the right to refuse to go through picket lines. The McAllister clause, in addition, extends this right to a refusal to handle unfair goods. In the instant case, the language used is that union members shall not be allowed to handle freight of an unfair company.[13] The undersigned finds that this difference is not significant in view of the emphasis in McAllister case on the actual conduct of the union engaging in the boycott and the apparent recognition of a public policy overriding the express terms of the contract.

Applying the standard of the McAllister case, as set forth above, to the instant case, the situation at each of the common carriers is as follows:

Santa Fe

The following paragraphs of the complaint are admitted:

12. Since on or about September 16, 1954, Respondent Teamsters by and through its agents, including Santa Fe Drivers' Steward, J. W. Jakeway, has induced and encouraged, despite the opposition of Santa Fe, the employees of Santa Fe to refuse to haul American Iron freight which freight had been loaded in and upon the trucks and trailers which these employees were to operate.

13. Since on or about September 21, 1954, all of the checkers, drivers, forklift operators, winch operators, dock-

[13] See Conway's Express, 87 NLRB 972, 983, n. 33.

n and helpers of Santa Fe have refused to receive, check, haul or otherwise handle American Iron freight.

14. Upon each and every occasion named above in Paragraphs 12 and 13, Santa Fe by and through its agents, J. P. Smith and Charles W. Dean, has specifically instructed said employees mentioned above in Paragraphs 12 and 13 to receive, check, haul or otherwise handle American Iron Freight.

15. On or about September 17, 1954, Respondent Teamsters by and through its Santa Fe Dock Steward, Clifford M. Troxel, orally instructed all Santa Fe dock employees to refuse to handle freight to or from American Iron.

16. On or about September 26, 1954, Respondent Teamsters by and through its agents, Ralph Mitchell and Cilfford Troxel, again instructed all Santa Fe dock employees to refuse to handle American Iron freight.

Paragraph 12 refers to instances when two Santa Fe over-the-road drivers who were not members of Teamsters Local 886, but of another local, refused to handle trucks and trailers containing some American Iron shipments. Their local also was party to a contract with a hot goods clause.

Testimony also amplified the allegations of instructions to employees not to handle American Iron freight.

Clifford M. Troxel, a driver and Teamster steward at Santa Fe, testified that he told union employees at Santa Fe that he thought it unwise to handle American Iron freight in view of the hot cargo clause in their contract.

604 Noah Futrell, a dispatcher whose duties included blocking or receipting bills, testified that on one occasion in October, a Teamster dock steward, L. C. Adams told him not to block an American Iron shipment and he did not do so.[14] Futrell, who the undersigned finds was a

[14] This incident was added by amendment to the complaint.

non-supervisory employee at the time, was not in the Teamster bargaining unit, but was a member of that union. His testimony is credited. The Respondent Teamsters is responsible for the conduct of Mitchell, Jakeway, Troxel, and Adams. The stewards were implementing union policy which had been transmitted by Mitchell, their business representative.

The occurrences at Santa Fe fall within the McAllister standards and thus the conduct of the Respondent Teamsters was violative of the Act. Here, there was an unlawful objective (the breaking of business relations between Santa Fe (the secondary employer) and American Iron (the primary employer)). There was inducement by direct instructions to employees from union officials not to handle American Iron freight. There was a refusal to handle that freight. Santa Fe agents specifically instructed their employees to handle the freight, but their employees refused to do so.

Gillette

The following allegations of the complaint are admitted:

17. On or about October 6, 1954, Respondent Teamsters by and through its agents, Ralph Mitchell and Robert Hawkins, Gillette Dock Stewards, orally instructed Gillette dock employees to refuse to receive, check or otherwise handle American Iron freight.

18. On or about October 6, 1954, the Gillette dock employees refused to receive, check or otherwise handle American Iron freight.

19. On or about October 6, 1954, after the incident related in Paragraph 18 above, Gillette by and through their Local Freight Agent, Mr. Berrong, instructed said Gillette dock employees to go ahead and receive, check and otherwise handle American Iron freight despite their refusal, whereupon said Gillette employees did receive, check or otherwise handle American Iron freight.

Leon Berrong testified that on or about October 5 or 6 he had a discussion with Mitchell at which the Gillette dock foreman and the Teamsters steward at Gillette, Robert Hawkins, were present. Berrong wanted a statement or opinion from Mitchell as to whether he considered American Iron freight unfair once it was placed on the Gillette loading dock and whether or not the dock employees could handle it. Mitchell refused to make a definite statement, but referred Berrong and the others to Article 4 of the contract between Gillette and the Respondent Teamsters. After this conversation, Berrong received reports from his dock foreman that the dock employees refused to handle American Iron freight or to sign receipts for it.

About the time of his conversation with Mitchell, Gillette employees refused to sign for or handle American Iron freight in Berrong's presence. He asked each employee individually whether he would sign for the freight and each refused. When he asked again whether employees would handle the freight, none of them agreed to do so until one of them made a telephone call and then said the men would do so. Berrong's testimony, which has not been contradicted, is credited.

605 The three key elements of the McAllister rule exist in the incidents at Gillette. There was a definite refusal to obey Berrong's instructions to handle American Iron freight. Although this refusal was temporary, it was none the less violative of the Act.[15] In any event, according to Berrong's uncontradicted testimony, the dock employees refused to handle American Iron freight after court proceedings in this case on October 16.

Time

The complaint alleges and it is admitted (except the alleged use of threats in paragraph 21):

[15] Western Express Company, Inc., 91 NLRB 340, 341.

20. Since on or about September 17, 1954, Respondent Teamsters by and through its agents, Ralph Mitchell and Roy McGilliard, Time Dock Steward, by appeals and oral instructions has induced and encouraged Time dock employees to refuse to receive, check or otherwise handle American Iron freight.

21. Since on or about October 5 or 6, 1954, Respondent Teamsters by and through its agents, Ralph Mitchell and Roy McGilliard, and its Time employees union members, has attempted to keep Time supervisory personnel from handling the American Iron freight by oral statements, threats, and appeals.

Thomas Armstrong, dock foreman at Time, testified that during the strike he and an assistant dock foreman attempted to personally handle American Iron shipments in order to avoid "a lot of confusion." However, both the dock employees and Armstrong's superiors took the position that it would be a violation of the standard Teamster contract to which this carrier and the other common carriers were parties, for these supervisory employees to do the manual work they were doing. The assistant dock foreman, on instructions from the terminal manager, selected a dock employee, Bobby Brown, and directed him to load the American Iron freight. Brown refused and said, according to Armstrong, that the Teamsters steward, Roy McGilliard, had told him that he would be fined $65 if he handled the "unfair freight."

The day after this incident, Armstrong and his assistant spoke with McGilliard. The latter quoted Mitchell as stating that none of the union employees should handle the American Iron freight. Armstrong asked McGilliard to find out whether Armstrong or his assistant could handle that freight or whether it could not be handled at all. McGilliard later reported that he had called Mitchell and had not been able to obtain a definite answer from him, although Mitchell had told McGilliard to work things out as

best he could without causing an unnecessary confusion. Armstrong and his assistant then resumed the personal handling of American Iron freight and did not ask the union members to load it. There were no further incidents.

Mitchell denied telling any one that he might be fined or saying anything to a union steward about a fine. He testified that he did not know a Bobby Brown. He further testified that a union steward is elected by union members to present their grievances to the business agent and that a steward has no authority to call a strike or make any threats.

606 The undersigned credits Armstrong's uncontradicted testimony as to the Brown incident and the conferences with McGilliard. Despite Mitchell's testimony about the limited power of a steward, the undersigned concludes that the Respondent Teamsters is responsible for McGilliard's conduct. Employees had been instructed by their union not to handle American Iron freight. McGilliard was the representative of the Union at the Time loading dock. His directions implementing those general instructions were within the scope of his authority. There was a violation of 8 (b)(4)(A) here.

Hall

The following paragraphs of the complaint are admitted (except for the allegation of threats in paragraph 22):

22. Since on or about September 16, 1954, Respondent Teamsters, by and through its agents, Ralph Mitchell and Bobby L. Wilkerson, Hall Dock Steward, has by oral instructions, threats and appeals induced and encouraged Hall dock employees to refuse to receive, check or otherwise handle American Iron freight.

23. Since on or about September 16, 1954, Hall dock employees have refused to receive, check or otherwise handle American Iron freight although Hall has specifically instructed said employees to handle American Iron freight.

Claude Lowe, terminal manager for Hall, testified as to two occasions during the American Iron strike when he made special efforts to try to have American Iron merchandise handled by his dock employees. On the first occasion, he asked an employee to sign for the freight and the employee did so. However, Bobbie Wilkerson, the Teamster dock steward told Lowe the men could not handle American Iron shipments and, on that basis, Lowe told American Iron representatives that the Company could not forward its freight, although it desired to do so.

Lowe also testified that he asked the employees to handle American Iron freight, but never insisted they handle it. Lowe had a telephone conversation with Mitchell in which he reported that his dock employees had refused to handle American Iron freight, and protested that other carriers were handling this freight. Mitchell referred him to his contract with the Teamsters.

Wilkerson, corroborated Lowe's testimony that the former had told the latter that the dock employees would not handle American Iron freight. Wilkerson testified that the sequence of events bearing on their refusal was as follows: The strike had been on approximately 1 week when an American Iron shipment was offered and received at Hall on a Friday. The night checker who received the freight reported this to Wikerson.

The following Monday or Tuesday, Wilkerson spoke with Mitchell at the Hall dock. According to Wilkerson, Mitchell asked whether the men had handled American Iron freight. When Wilkerson said there had been one instance, Mitchell showed him Section 4 (b) of the standard Teamster contract and said that such action was a violation of the contract. Wilkerson said he would relay this information to the dock employees. Mitchell also said that charges might be filed against any union member handling such freight, his dues might be refused, and his

employment might be affected under union-security provisions in the contract.

Wilkerson then told the dock employees it would be a violation of the contract to handle American Iron freight and they could lose their union book if they did so. When supervisors asked that the freight be handled,
607 he told them it would be a violation of the contract to do so and the men could not handle it. He also told this to an American Iron driver who took freight to another shipper. Mitchell later reiterated instructions not to handle American Iron freight.

Mitchell, in his testimony, agreed that he had spoken with Wilkerson. His version of the conversation is as follows:

Q. (By Mr. Grayson) Mr. Mitchell, at any time during the tenure of this strike from October 15—I beg your pardon—from September 15 until October 21, have you ever made any threats to anybody? If so, who did you make your threats to causing them to stop handling or hauling these goods? A. I have made no threats to anybody.

Q. Were you here when Wilkerson, the dock steward for Hall testified? A. I was.

Q. Do you recall that he testified something to the effect that you told him that a union member might lose their book or card, do you remember him testifying to that? A. I did remember.

Q. Well, do you remember talking to Mr. Wilkerson during the strike? A. I do.

Q. Relate, if you know, the conversation which you had with Mr. Wilkerson. A. Well, I walked up on the dock and Mr. Wilkerson asked me, "Can we handle the freight?" I said, "Mr. Wilkerson, you are in violation of the contract as I interpret it."

He said, "Well, what would happen if we do handle it?" I said, "Well, I am not sure what would happen."

He said: "Can we take the books?" I said "I can take nobody's books, that's private property of the man that has the book, and I certainly can't take it."

Q. Then if Mr. Wilkerson told anybody that they might lose their books, he didn't do it as a result of anything that you told him; is that right? A. That's right. If Mr. Wilkerson said that they may lose their books it must have been someone else that told him that, because I certainly didn't.

608 The undersigned found Wilkerson's testimony reliable and clear. His version and the testimony of Lowe are credited. Even if Mitchell did not make the statement attributed to him by Wilkerson, the Respondent Teamsters is responsible for Wilkerson's instructions to the dock employees since he was being used as the conduit for information and instructions from the Union to the dock employees on their obligations during the strike.

The undersigned finds that the Respondent Teamsters violated Section 8 (b)(4)(A) by the instructions and warnings issued to the Hall dock employees and by Wilkerson's refusal on behalf of the dock employees to handle American Iron freight even though supervisors asked that it be done. While management did not take any action to enforce its request, its wishes were made known and Wilkerson's refusal was definite and unambiguous.

Lee Way

It is alleged in the complaint, as amended, that dock employees at Lee Way refused to handle a picketed American Iron shipments. This allegation was denied. No evidence was introduced to establish that the refusal at Lee Way was in violation of definite instructions given to the employees. Accordingly, the undersigned finds that there

has been a failure of proof of a violation of Section 8 (b) (4) (A) at Lee Way by the Respondent Teamsters.

C. The alleged 8 (b) (1) (A) violation

The complaints allege that the Respondent Teamsters and the Respondent Machinists, by their inducement and encouragement of employees of the common carriers to engage in concerted refusals to handle freight, as set forth above, have restrained and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act and have thereby violated Section 8 (b) (1) (A) of the Act. These activities have been found to be violative of Section 8 (b) (4) (A) of the Act.

The Board has held that violations of Section 8 (b) (4) (A) are not ipso facto violations of Section 8 (b) (1) (A).[16] The activities engaged in by the Respondents were not in themselves independent violations of 8 (b) (1) (A). There was picketing by the Respondent Machinists and some noncoercive requests not to handle American Iron freight. The instructions and directions issued by the Respondent Teamsters were also noncoercive. However, there were some threats of union disciplinary action if the instructions were violated. This was within the purview of the proviso to Section 8 (b) (1) (A) and was not violative of the Act.[17] The undersigned concludes that the activities of the Respondents were not violative of Section 8 (b) (1) (A) of the Act.

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[16] Printing Specialties and Paper Converters Union, 82 NLRB 271, 273; Local 74, United Brotherhood of Carpenters and Joiners, etc., (Watson's Specialty Store), 80 NLRB 533, 539, 549; International Brotherhood of Teamsters, etc., Local 87 (Di Giorgio Wine Company,) 87 NLRB 720, 723, 750.

[17] International Typographical Union, 86 NLRB 951, 955-57; Minneapolis Star and Tribune Company, 109 NLRB No. 109.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondents set forth in Section III, above, occurring in connection with the operations of the Charging Party and the named motor freight common carriers, have a close, intimate, and substantial relation to trade, traffic and commerce among the several States and such of them as have been found to be unfair labor practices tend to burden and obstruct commerce and the free flow of commerce.

609

V. The Remedy

Having found that the Respondents have violated Section 8 (b) (4) (A) of the Act, it will be recommended that they cease and desist therefrom and take certain affirmative action which it is found necessary to effectuate the policies of the Act.

Conclusions of Law

1. Lodge No. 850, International Association of Machinists, AFL, and General Drivers, Chauffeurs, Warehousemen and Helpers Union Local No. 886, AFL, are labor organizations within the meaning of Section 2 (5) of the Act.

2. The Respondents, by inducing and encouraging employees of Gillette Motor Transport, Inc., D. C. Hall Transport, Inc., Santa Fe Trails Transportation Company, and Time, Inc., and the Respondent Machinists by inducing and encouraging employees of Lee Way Motor Freight Lines, to engage in a strike or concerted refusal in the course of their employment to handle freight transported by American Iron and Machine Works Company, where an object thereof was to force or require their employers to cease doing business with American Iron and Machine Works Company have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (b) (4) (A) of the Act.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

4. It has not been established that the Respondent Teamsters violated Section 8 (b) (4) (A) of the Act by any activities at Lee Way Motor Freight Lines nor has it been established that the Respondents violated Section 8 (b) (1) (A) of the Act.

RECOMMENDATIONS

Upon the basis of the above findings of fact and conclusions of law it is recommended that the Respondents shall:

1. Cease and desist from inducing and encouraging the employees of any employer other than American Iron and Machine Works Company to engage in a strike or concerted refusal in the course of their employment to perform services for their employer, where an object thereof is to force and require an employer or person to cease doing business with American Iron and Machine Works Company.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Post at their respective business offices in Oklahoma City, Oklahoma, copies of the notice attached hereto as Appendix A. Copies of said notice, to be furnished by the Regional Director for the Sixteenth Region, after being duly signed by official representatives of the Respondents, shall be posted by the Respondents immediately upon receipt thereof, and maintained by them for a period of sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to members of the Respondents are customarily posted. Reasonable steps shall be taken by the Respondents to insure that said notices are not altered, defaced, or covered by any

other material. The Respondents shall also sign copies of the notice which the Regional Director shall submit for posting at the Oklahoma City premises of Gillette Motor Transport, Inc., D. C. Hall Transport, Inc., Santa Fe Trails Transportation Company, and Time, Inc., said employers being willing. The Respondent Machinists shall also sign a copy of the notice for posting at Lee Way Motor Freight Lines;

619 (b) Notify the Regional Director for the Sixteenth Region in writing within twenty (20) days from the date of service of this Intermediate Report and Recommended Order what steps the Respondents have taken to comply herewith.

It is also recommended that unless the Respondents shall, within twenty (20) days from the date of service of an order transferring this case to the Board, notify the Regional Director, in writing, that they will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the Respondents to take the action aforesaid.

It is further recommended that the complaint be dismissed insofar as it alleges that the Respondent Teamsters violated Section 8 (b) (4) (A) by activities at Lee Way Motor Freight Lines and that the Respondents violated Section 8 (b) (1) (A) of the Act.

Dated at Washington, D. C., this 18th day of March 1955.

SIDNEY L. FEILER
Sidney L. Feiler
Trial Examiner

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APPENDIX A

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE RECOMMENDATIONS OF A TRIAL EXAMINER

of the National Labor Relations Board, and in order to effectuate the policies of the Labor Management Relations Act, we hereby give notice that:

We will not induce and encourage the employees of any employer other than American Iron and Machine Works Company to engage in a strike or concerted refusal in the course of their employment to perform services for their employer, where an object thereof is to force or require any employer or person to cease doing business with American Iron and Machine Works Company.

LODGE 850, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL
(Labor Organization)

Dated

By

(Representative) (Title)

GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL 886, AFL
(Labor Organization)

Dated

By

(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

632 UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 16-CC-47

Case No. 16-CC-48

Decision and Order

On March 18, 1955 Trial Examiner Sidney L. Feiler issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices alleged in the complaint and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner also found that Respondents had not engaged in certain other alleged unfair labor practices and recommended that the complaint be dismissed as to them. Thereafter, the Respondents filed exceptions to the Intermediate Report with supporting briefs.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, insofar as they are consistent with this Decision and Order.

1. We find, as did the Trial Examiner, that Re-
633 spondent Teamsters by its inducement of employees of the common carriers (secondary employers) to engage in a concerted refusal in the course of their employment to handle freight brought by American Iron (the primary employer) to the carriers' docks, with an object of forcing or requiring the carriers to cease doing busi-

[1] The AFL and CIO having merged subsequent to the hearing in this proceeding, we are amending the identification of the affiliation of the unions accordingly.

ness with American Iron violated Section 8 (b) (4) (A) of the Act.

Like the Trial Examiner, we reject the contention of Teamsters that its conduct was excused by the "hot cargo" clause in the Teamsters' contracts with the common carriers. This clause provided that members of Teamsters "shall not be allowed to handle or haul freight to or from an unfair company." However, in rejecting this defense, we do not rely, as did the Trial Examiner, on the McAllister case,[2] but rather on more recent Board decision in the Sand Door case,[3] which was decided after the issuance of the Intermediate Report in the case at bar. As stated in the principal opinion in that case, regardless of the existence of a "hot cargo" clause, any direct appeal to employees by a union to engage in a strike or concerted refusal to handle a product is proscribed by the Act when one of the objectives set forth in Section 8 (b) (4) (A) is present. Thus, while Section 8 (b) (4) (A) does not forbid the execution of a hot cargo clause or a union's enforcement thereof by appeals to the employer to honor his contract, the Act does, in our opinion, preclude enforcement of such clause by appeals to employees, and this is so whether or not the employer acquiesces in the union's demand that the employees refuse to handle "hot" goods. Accordingly, in affirming the Trial Examiner, we do not find it necessary to rely as he did, on the fact that the secondary employers herein did not acquiesce in the refusal of their employees to handle American Iron's freight. In our view, it is sufficient that there was direct inducement of such employees by Teamsters not to handle such freight, with an object of forcing the secondary employers to cease dealing with American Iron.

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[2] McAllister Transfer, Inc., 110 NLRB 1769.

[3] Sand Door and Plywood Co., 113 NLRB No. 123. Members Murdock and Peterson dissented.

2. Like the Trial Examiner, we find also that Re-
634 spondent Machinists violated Section 8 (b) (4) (A) of the Act (a) by picketing American Iron trucks at the docks of the neutral common carriers while the trucks were attempting to deliver American Iron freight to the carriers,[4] and (b) the oral appeals of Machinists' agents to the employees of the carriers not to handle American Iron freight at the carrier's docks; all with the object of forcing the carriers to cease dealing with American Iron.[5]

ORDER

Upon the entire record in this case and pursuant to Section 10 (c) of the National Labor Relations Board, as amended, the National Labor Relations Board hereby orders that the Respondents, General Drivers, Chauffeurs, Warehousemen and Helpers Union, Local No. 886, AFL-CIO and Local 850, International Association of Machinists, AFL-CIO, and their officers, representatives, agents, successors and assigns, shall:

1. Cease and desist from inducing or encouraging the employees of Gillette Motor Transport, Inc., D. C. Hall Transport, Inc., Santa Fe Trails Transportation Company, Time, Inc. and Lee Way Motor Freight Lines, or any other employer, to engage in a strike or concerted refusal in the course of their employment to work on or handle freight consigned to or received from American Iron and Machine Works Company, or any other employer, where an object thereof is to force or to require any employer or person to cease doing business with American Iron and Machine Works Company.

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[4] We find that this picketing was unlawful, not only because of the availability of the primary employer's premises for that purpose, but also because the pickets failed to disclose that their dispute was only with the primary employer. See Moore Dry Dock Company, 92 NLRB 547.

[5] As we have found that the hot cargo clause in the Teamsters' contract with the carriers is not available as a defense to the Teamsters, it necessarily follows that such clause is likewise not available to the Machinists.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Post at their respective business offices in Oklahoma City, Oklahoma, copies of the notice attached
635 to the Intermediate Report as Appendix A.[6] Copies of said notice, to be furnished by the Regional Director for the Sixteenth Region, after being duly signed by official representative of the Respondents, shall be posted by the Respondents immediately upon receipt thereof, and maintained by them for a period of sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to members of the Respondents are customarily posted. Reasonable steps shall be taken by the Respondents to insure that said notices are not altered, defaced, or covered by any other material. The Respondents shall also sign copies of the notice, which the Regional Director shall submit for posting at the Oklahoma City premises of Gillette Motor Transport, Inc., D. C. Hall Transport, Inc., Sante Fe Trails Transportation Company, and Time, Inc. said employers being willing. The Respondent Machinists shall also sign a copy of the notice for posting at Lee Way Motor Freight Lines;

(b) Notify the Regional Director for the Sixteenth Region in writing within ten (10) days from the date of this Order what steps the Respondents have taken to comply herewith.

It is further Ordered that the complaint be dismissed insofar as it alleges that the Respondent Teamsters violated Section 8 (b) (4) (A) of the Act by activities at Lee Way

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[6] This notice shall be amended by substituting for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER," in the caption thereof, the words "A DECISION AND ORDER." In the event that this Order is enforced by decree of a United States Court of Appeals, there shall be substituted for the words "PURSUANT TO A DECISION AND ORDER" the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER."

Motor Freight Lines, and that the Respondents violated Section 8 (b) (1) (A) of the Act.

Dated, at Washington, D. C. March 15, 1956.

BOYD LEEDOM
Boyd Leedom, *Chairman*
PHILIP RAY RODGERS
Philip Ray Rodgers, *Member*
STEPHEN S. BEAN
Stephen S. Bean, *Member*
(SEAL) NATIONAL LABOR RELATIONS BOARD

636 PHILIP RAY RODGERS, MEMBER, concurring:

I concur in the result reached by Chairman Leedom and Member Bean only because I am convinced that "hot cargo" clauses are contrary to public policy and cannot, therefore, serve as a defense to a complaint charging a violation of Section 8 (b) (4) (A) of the Act. I have stated before, and now reiterate, that Section 8 (b) (4) (A) was specifically intended by Congress to safeguard the public interest, i.e., "in order adequately to protect the public welfare which is inextricably involved in labor disputes." A "hot cargo" provision, as I see it, is a device to immunize in advance the very conduct which Congress, in response to a dire public need, sought effectively to eliminate. I therefore feel that we cannot, in the light of our mandate from Congress, permit this device to preclude what would otherwise require the finding of an unfair labor practice under the statute.

Dated, Washington, D. C. March 15, 1956.

PHILIP RAY RODGERS
Philip Ray Rodgers, *Member*
NATIONAL LABOR RELATIONS BOARD

ABE MURDOCK and IVAR H. PETERSON, MEMBERS, *dissenting*:

In this case a majority of the present Board completes a reversal of a principle of Board law[7] that has been affirmed in each United States circuit[8] and district court[9] in which the issue has been raised. Indeed, as the Trial Examiner found, the General Counsel's request for a preliminary injunction pending the Board's decision in this very case was refused by the United States District Court for the Western District of Oklahoma on the ground that the neutral employers involved had granted their employees permission by contract to refuse to handle freight from the American Iron and Machine Works Company,
637 an employer engaged in a labor dispute with the Respondent Machinists. The majority, however, ignoring and disregarding the decision of these courts, finds that the Respondents Teamsters and Machinists have violated Section 8 (b) (4) (A) despite the fact that the conduct of these Unions did not extend beyond inducement of employees not to handle freight from an unfair company, work which their employers and the Teamsters had agreed by a lawful[10] contract that employees would not be "allowed" to perform. We do not believe that the logic and force of considered judicial decisions which reaffirm the correctness of the Board's initial interpretation of the Act in Conway's Express should be so cavalierly ignored.

The McAllister case[11] was the first to intrude upon the

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[7] Conway's Express, 87 NLRB 972; Pittsburgh Plate Glass Company, 105 NLRB 740.

[8] Rabouin d/b/a Conway's Express, 195 F. 2d 906 (C.A. 2).

[9] Madden v. Local 442, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, 114 F. Supp. 932 (D.C. Wisc.); N.L.R.B. v. Lodge 850, AFL's Machinists and Local 886, AFL's Teamsters, U.S. D.C. E.D. Okla., October 16, 1954.

[10] The majority decision finds that "Section 8 (b) (4) (A) does not forbid the execution of a hot cargo clause."

[11] McAllister Transfer, Inc., 110 NLRB 1769.

theretofore well-established Conway's Express doctrine. In the latter case the Board, affirmed by the Court of Appeals for the Second Circuit, held that an employer could lawfully agree in advance that its employees would not be required to handle freight from any employer involved in a labor dispute and that the invocation of such a contractual clause by a Union was not proscribed by Section 8 (b) (4) (A). The Board said:

It is evident from these facts that the three secondary employers, in effect, consented in advance to boycott Conway's. As they consented, their employees' failure to deliver freight to or accept freight from Conway trucks was not in the literal sense a "strike" or "refusal" to work, nor was any such concerted insubordination contemplated by the Respondent when it caused the employees to exercise their contractual privilege.

Expressly upholding the validity of the union's conduct in that case, the Court of Appeals held:

The union cannot have committed an unfair labor practice under this section in regard to those employers who refused to handle Rabouin's shipments under the terms of the area agreement provision relating to cargo shipped by struck employers. Consent in advance to honor a hot cargo clause is not the product of the union's "forcing or requiring any employer . . . to cease doing business with any other person."

In McAllister, Chairman Farmer, whose vote was necessary to the majority decision, stated that he was
638 "loathe to disturb" the Company's principle since it had court approval. However, he distinguished the two cases on the ground that in McAllister, unlike Conway's the secondary employers had posted notices specifically directing their employees to handle hot cargo notwithstanding their contractual agreement to the contrary. This distinction, the validity of which we ques-

tioned in our dissenting opinion in McAllister, was apparently abandoned by the Board majority in the Sand Door and Plywood case[12] where Chairman Farmer and Member Leedom held, on the one hand, that employers could "agree in advance" to boycott another employer by executing a hot cargo clause but, on the other hand, that such an agreement was not defense to an appeal by the union to employees not to handle goods subject to the agreement. We can only read this decision as meaning that an agreement is not an agreement whenever the actual facts contemplated by the agreement arise. If this logic prevails in the field of labor relations, then parties to collective bargaining agreements can never provide for the peaceful settlement of future disputes nor can either rely upon the solemnly pledged word of the other in a lawful existing contract.

The rationale of the Sand Door and Plywood case is, according to the majority, the sole basis for its decision in the instant case. The majority finds that Section 8 (b) (4) (A) "does not forbid the execution of a hot cargo clause or a union's enforcement thereof by appeals to the employer to honor his contract." Notwithstanding this finding, the majority then concludes that a union may not seek enforcement of the clause by appeals to employees "whether or not the employer acquiesces in the union's demand that the employees refuse to handle the 'hot goods.'" The inconsistency of these findings is so apparent that they must, in our opinion, fall of their own weight. What good is a contract that deprives one of the parties of a benefit derived through collective bargaining unless the other party unilaterally decides to "honor his contract" rather than to breach it? Indeed, the language of this decision is so broad that even if an employer reaffirms his adherence to an existing contract the union may not, under penalty of violating Section 8 (b) (4) (A),

[12] San Door and Plywood Co., 113 NLRB No. 123.

notify its members that the contract applies. From
639 the majority's decision it would seem that officials of the Teamsters may not so much as discuss a hot cargo clause at a membership meeting for this may be construed by the majority as an inducement of employees to engage in a strike for an object proscribed by Section 8 (b) (4) (A). Carried further, the majority's decision may also be taken to mean that the union cannot send copies of a contract containing a hot cargo clause to its members on whose behalf the contract was signed for this conduct may similarly be construed as an inducement of employees to read and therefore rely upon their contractual rights. Such a result, in our opinion, reduces the majority's position to an absurdity.

For these reasons and for the reasons expressed in our dissenting opinions in McAllister and Sand Door and Plywood so far as they are applicable here, we would dismiss this complaint in its entirety both with regard to the Teamsters and the Machinists. Although the latter union was not a party to the contract, this circumstance is irrelevant in determining whether employees have been induced by the Machinists to engage in a strike or concerted to work within the meaning of Section 8 (b) (4) (A). If the failure of employees to handle hot goods is not considered a strike or concerted refusal in the course of their employment to handle the goods of another employer because it is excluded from the scope of their employment by contract, it would seem to follow that the inducement of them not to handle such goods, whether or not such inducement is by the union which is a party to the "hot cargo" agreement, is not violative of Section 8 (b) (4) (A). In other words, as the parties to the contract have by contract excluded the handling of "hot goods" from the required duties of the employees covered by the contract, the inducement of the employees by a union not a party to the contract not to do something that they are not required to do and which indeed is outside the scope of their

employment would appear to be no more a violation of the Act than would such inducement by their own union. As a matter of fact in this case it seems clear that the parties to the contract intended to exclude the handling of hot cargo from the employees' scope of employment for the "hot cargo" clause provides that,

"Members of the Union shall not be *allowed* to handle or haul freight to or from an unfair company, . . . (Emphasis supplied.)"

640 This language may be construed as constituting the refusal to handle hot cargo as of a duty than a privilege. That is, it expressly prohibits such activity and therefore may be considered as imposing a duty upon the employees not to handle hot cargo. How can it be held that another union that requested the employees covered by such a contract not to do that which they are prohibited by contract from doing, thereby has violated the law?

Dated, Washington, D. C., March 15, 1956.

ABE MURDOCK, *Member*
IVAR H. PETERSON, *Member*
NATIONAL LABOR RELATIONS BOARD

(Received May 2, 1955)

624 **Machinists' Exceptions to Intermediate Report and Recommended Order**

Respondent Lodge 850, International Association of Machinists, AFL, generally except to the Trial Examiner's Intermediate Report and Recommended Order filed with the National Labor Relations Board at Washington, District of Columbia, and specifically and generally object to the adoption thereof by the Board. The Respondent specifically excepts to the following findings and conclusions of the Trial Examiner:

I.

1. To the finding that the existence of a collective bargaining agreement which contained a no-strike clause and

the termination of the strike and picketing did not render the proceedings moot. (IR, P. 4, L. 1-7)

2. To the conclusion that the picketing was in violation of Section 8(b)(4)(A). (IR, P. 8, L. 16)

3. To the conclusion that the Respondent Machinists' picketing at the premises of the freight carriers in Oklahoma City was not permissible under the ambulatory situs doctrine. (IR, P. 5, L. 30-34)

625 4. To the conclusion that the words "We Do Not Ask Anyone To Cease Work" on the picket aprons would not constitute a valid defense under the circumstances of this case. (IR, P. 5, L. 43-45; P. 6, L. 1)

5. To the conclusion that the picketing was intended to do more than advertise the existence of a strike and that it was intended to disrupt the business relations between American Iron and the freight carriers. (IR, P. 6, L. 16-20)

6. To the conclusion that the words on the bottom of the picket apron were so small they could not be distinguished a few away and did not serve to blunt the purpose and effect of the picketing and that their use did not constitute a valid defense. (IR, P. 6, L. 20-23)

7. To the conclusion that the conduct of the Respondent Machinists must be evaluated independently of that of the Respondent Teamsters and that the defenses, if any, available to the latter are not thereby automatically available to the former. (IR, P. 6, L. 42-47)

8. To the findings that despite the language of the "hot cargo" clause in the Teamsters contract, the proof shows dock employees continued to handle the goods of American Iron. (IR, P. 6, L. 47-54)

9. To the finding that the dock employees continued to handle American Iron freight until instructed by the representatives of the Union not to do so. (IR, P. 7, L. 1-3)

10. To the conclusion that under the circumstances of this case the Teamsters contract could not constitute the basis for a defense which could be asserted by the Respondent Machinists. (IR, P. 7, L. 7-9)

11. To the conclusion that the Respondent Machinists violated Section 8(b)(4)(A) of the Act by the ambulatory picketing of the American Iron trucks. (IR, P. 7, L. 9-12)

12. To the finding that Pickett raised the issue of not handling American Iron freight in general and that Troxel got into a discussion with him as to whether secondary boycott would result from those tactics. (IR, P. 7, L. 42-47)

626. 13. To the finding that the Troxel's version of the conversation was more clear, logical and credible than Pickett's, particularly since both agreed that there had been a discussion of American Iron deliveries at the Santa Fe loading docks and problems in connection with the receipt of those deliveries. (IR, P. 7, L. 57-58; P. 8, L. 1-3)

14. To the conclusion that the urging of Pickett that Santa Fe employees not handle American Iron freight was an attempt to cause a refusal to handle work on the part of employees of a secondary employer, in violation of Section 8(b)(4)(A) of the Act. (IR, P. 8, L. 3-8)

15. To the finding that Gray testified that he heard Foster say "Something about this dock hand would lose his union card or his place in the union, or something to that effect." (IR, P. 8, L. 28-32)

16. To the finding that Foster told a dock hand at Time that he had a picket on a "hot" load of material and that Hancock testified that he heard Foster thank a dock steward and then the steward refused to sign for American Iron freight. (IR, P. 8, L. 37-45)

17. To the conclusion that the remarks made by Foster to the union representative of the Time dock employees

was an inducement or encouragement of these employees to cease handling American Iron shipments and was violative of Section 8(b)(4)(A) of the Act. (IR, P. 8, L. 45)

18. To the finding that Gray testified on September 15 or 16 when a Hall dock employee attempted to get on an American Iron truck to help unload, Foster who was about 10 or 15 feet away sitting in his car called out to the man not to help unload the truck, and that the man backed away from the truck. (IR, P. 8, L. 49-52)

19. To the finding that Gray's testimony was correct and that Foster's direction to a Hall employee not to help unload the American Iron truck was violative of the Act. (IR, P. 8, L. 60-62)

627 20. To the finding that Pickett asked whether the Leeway employees would recognize the Machinist picket line and to the finding that Hall replied that this was a new situation, but that he would try to find out the right thing to do, and further to the finding that Pickett then remarked that the employees should not handle American Iron freight in the future. (IR, P. 9, L. 9-13)

21. To the finding that Hall's testimony was reliable and the crediting of it. (IR, P. 9, L. 18-19)

22. To the conclusion that Pickett's remarks to Hall were violative of the Act and that the Respondent is responsible for Pickett's conduct. (IR, P. 9, L. 20-22)

23. To the conclusion that the same basic circumstances exist in the present case as existed in the McAllister case. (IR, P. 13, L. 58-61)

24. To the finding that occurrences at Santa Fe fell within the McAllister standards and thus the conduct of the Respondent Teamsters was violative of the Act. (IR, P. 15, L. 11-12)

25. To the finding that there was an unlawful objective (the breaking of business relations between Santa Fe (the

secondary employer) and American Iron (the primary employer)). (IR, P. 15, L. 13-15)

26. To the finding that Santa Fe agents specifically instructed their employees to handle the freight. (IR, P. 15, L. 16-18)

27. To the finding that three key elements of the McAllister rule exist within the incidents at Gillette. (IR, P. 16, L. 1-2)

28. To the conclusion that there was a definite refusal to obey Berrong's instructions to handle American Iron freight. (IR, P. 16, L. 2-3)

29. To the finding that the refusal to handle the freight was temporary none the less it was violative of the Act. (IR, P. 16, L. 3)

30. To the finding that a dock foreman at Time on instructions from the terminal manager selected a dock employee, Bobby Brown, and directed him to load the American Iron freight. (IR, P. 16, L. 33-35)

628 31. To the finding that Brown's refusal to handle the freight according to Armstrong and that the Teamsters Steward, Roy McGilliard, had told him that he would be fined $65.00 if he handled the "unfair freight". (IR, P. 16, L. 36-38)

32. To the finding that Armstrong's testimony as to the Brown incident and the conference with McGilliard should be credited. (IR, P. 17, L. 1-2)

33. To the conclusion that the Respondent Teamsters are responsible for McGilliard's conduct. (IR, P. 17, L. 2-5)

34. To the finding that McGilliard was a representative of the Union at Time loading dock and his directions implemented those instructions were within the scope of his authority. (IR, P. 17, L. 6-8)

35. To the finding that there was a violation of Section 8(d)(4)(A) as to Time incidents. (IR, P. 17, L. 8-9)

36. To the finding that the Respondent Teamsters is responsible for Wilkerson's instructions to the dock employees since he was being used as a conduit for information and instructions from the Union on their obligations during the strike. (IR, P. 19, L. 3-7)

37. To the conclusion that the Teamsters violated Section 8(b)(4)(A) of the Act by the instructions and warnings issued to the Hall dock employees and by Wilkerson's refusal on behalf of the dock employees to handle American Iron freight, even though the supervisor asked that it be done. (IR, P. 19, L. 9-13)

38. To the finding that while management did not take any action to enforce its request, its wishes were made known and Wilkerson's refusal was definite and unambiguous. (IR, P. 19, L. 13-14)

39. To the conclusion that the activities of the Respondents set forth in Section III, of the Intermediate Report, have a close, intimate, and substantial relation to trade, traffic and commerce among the several states and such of them as have been found to be unfair labor practices tend to burden and obstruct commerce and the free flow of commerce. (IR, P. 19, L. 51-56)

40. To the finding and conclusion that the Respondents violated Section 8(b)(4)(A) of the Act. (IR, P. 20, L. 3-4)

629 41. To the recommendation that the Respondents cease and desist therefrom and take certain affirmative action which is found necessary to effectuate the policies of the Act. (IR, P. 20, L. 4-6)

42. To the conclusion of law that the Respondents induced and encouraged the employees of Gillette Motor Transport, Inc., D. C. Hall Transport, Inc., Santa Fe Trails Transportation Company, and Time, Inc. and the Respondent Machinists induced and encouraged the employees of Leeway Motor Freight Lines to engage in a strike or concerted refusal in the course of their employment to handle

freight transportation by American Iron and Machine Works Company, where an object thereof was to force or require their employees to cease doing business with American Iron and Machine Works Company, and have engaged in and are engaging in unfair labor practices within the meaning of Section 8(b)(4)(A) of the Act. (IR, P. 20, L. 14-23)

43. To the conclusion of law that there are unfair labor practices which effect commerce within the meaning of Section 2(6) and (7) of the Act. (IR, P. 20, L. 25-26)

44. To the recommendations that the Respondents cease and desist from inducing and encouraging employees of any employer other than American Iron and Machine Works Company, to engage in a strike or concerted refusal in the course of their employment to perform services for their employer, where the object thereof is to force and require an employer or person to cease doing business with American Iron and Machine Works Company. (IR, P. 20, L. 38-43)

45. To the recommendations that the Respondents take action to correct the unfair labor practices. (IR, P. 20, L. 45-62) and (IR, P. 21, L. 1-15)

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II.

The Respondent takes exception to the Trial Examiner's failure to find and conclude:

1. That the controversy had been rendered moot by the existence of a collective bargaining agreement executed by it and the American Iron and Machine Works Company, which contract contained a no-strike clause and still further by the cessation of the strike and the picketing due to the signing of the collective bargaining agreement.

2. That the picketing by the Respondent Machinists was ambulatory picketing within the rule of the Moore Drydock Company and the Schultz Refrigerated Service, Inc. cases.

3. That since the Respondent Teamsters' contract contained a "hot" cargo clause, the Respondent Teamster could honor the ambulatory picket line of the Respondent Machinists without violating the Act and therefore the Respondent Machinists' conduct of notifying the members of the Respondent Teamsters that the American Iron Company was an unfair company could not constitute encouragement or inducement of the Teamsters' members to engage in a concerted refusal in the course of their employment to handle the goods of another employer.

4. That the McAllister case is not applicable under the facts and circumstances of the present case.

5. That the Respondent Machinists made no oral request or threats to any of the common carriers on or off their respective premises.

6. That the activities of the Respondent Teamsters was protected under the "hot cargo" clause as decided in Conway Express and the Pittsburgh Plate Glass Company case. 631

III.

The Respondent takes exception to the Trial Examiner's failure to grant the Respondents motions to dismiss the Complaint in its entirety on grounds of mootness as well as the failure of the General Counsel to sustain the burden of proof with respect to the unfair labor practices involved and, accordingly renews its motions in these respects.

Respectfully submitted,

LOUIS P. POULTON
Louis P. Poulton, Attorney For and in Behalf of Lodge 850 International Association of Machinists

Dated this 20th day of April 1955
at Washington, D. C.

(Received May 2, 1955)

623 **Teamsters' Exceptions to Intermediate Report and Recommended Order**

Respondent General Drivers, Chauffeurs, Warehousemen and Helpers Union Local No. 886, AFL, generally except to the Trial Examiner's Intermediate Report and Recommended Order filed with the National Labor Relations Board at Washington, District of Columbia, and specifically and generally object to the adoption thereof by the Board. The Respondent specifically excepts to the following findings and conclusions of the Trial Examiner:

1. That the Facts and Circumstances in the instant case are not distinguishable from the "Conway" case and that the same ruling should be followed.

2. That acquiescence on the part of the Secondary employers is not required for their employees to refuse to handle unfair freight when both the employers and employees are bound by the obligations of contract to not allow said unfair freight to be handled.

3. That Teamsters Union, Local 886 respects their Contracts and that they are bound to abide by them and any reasonable means employed by the Union to carry out said contractual obligations are not a violation of the NLRB so long as the contract is legal.

(Received March 26, 1956)

643 **Motion for Reconsideration of Respondent, Lodge 850, International Association of Machinists, AFL-CIO**

On March 18, 1956, the National Labor Relations Board issued a Decision and Order in the above-captioned case.[1] Lodge 850, International Association of Machinists, AFL-CIO, one of the Respondents in this case, respectfully moves the Board to reconsider its Decision and Order for the following reasons:

[1] 115 NLRB No. 121.

THE BOARD DID NOT PASS ON THE RESPONDENT'S CONTENTION THAT THE CONTROVERSY INVOLVED IN THIS CASE IS NOW MOOT AND WAS MOOT PRIOR TO THE ISSUANCE OF THE COMPLAINT

The Trial Examiner, in his Intermediate Report, found that the defense of mootness was not available to the Respondents in this case[2] The Respondent excepted to this finding in its Exceptions to the Intermediate Report and Recommended Order.[3] The Board did not rule on
644 the Respondent's Exception to the Trial Examiner's finding on the mootness issue, therefore, we respectfully request the Board to reconsider its decision in light of the mootness of the controversy.

ARGUMENT

THE CONTROVERSY IS NOW RENDERED MOOT BY COMPLETE SETTLEMENT OF TERMS AND CONDITIONS OF EMPLOYMENT EMBODIED IN A COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES WITHOUT THE COMPULSION THAT ARISES FROM AN INJUNCTION

At the hearing, the Respondent moved to dismiss the Complaint in its entirety on the grounds that the controversy was moot by the signing of a collective bargaining agreement. The Trial Examiner, in his Intermediate Report, denied the Respondent's Motion. The Respondent renewed its Motion and again raised the issue of mootness in its Exceptions and Brief. The Trial Examiner, in his findings, admitted that on October 21, 1954, the American Iron Machine Works Company and Lodge 850, International Association of Machinists, AFL-CIO, signed a collective bargaining agreement.[4] This agreement resolved all differences between the parties concerning the terms and

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[2] Intermediate Report, page 4, lines 1 to 7.

[3] See Respondent Machinists' Exceptions to Intermediate Report and Recommended Order, pg. 1, par. 1.

[4] Respondent Machinists Exhibit No. 2.

conditions of the employment of the employees represented by the Respondent at the American Iron Machine Works Company.

At the time the Complaint was issued, there was no longer any picketing at American Iron's premises nor was there any picketing of American Iron's trucks. The contract contained a "no strike" clause prohibiting the Respondent from striking for a period of one year from the date of the contract.[5] After the signing of the contract by the parties, all disputes between American Iron and the Respondent were resolved and the strike and picketing was completely ended. There is no evidence in the record that since that time, the Respondent intended to picket the Employer's premises in violation of the no strike provision or that it did. Indeed, now more than one year has passed since this matter at bar has been litigated and there is no evidence which would support the requirement of posting a notice.

The dispute was resolved and therefore the Complaint presented a moot controversy. In Local 74, United Brotherhood of Carpenters and Joiners, AFL, et al., vs. NLRB, 341 U.S. 707, 715, involving a secondary boycott
645 under Section 8(b)(4)(A), the Court stated:

"This case has not been rendered moot by the completion of the renovation project. The Complaint was against Petitioner's use of secondary pressure upon Watson's in a manner proscribed by the Statute. The use of such pressure on this renovation project was merely a sample of what might be repeated elsewhere if not prohibited. *The underlying dispute between the Petitioner and Watsons has not been shown to have been resolved.*" (Emphasis added)

In our view, it appears that had the dispute in question been resolved, the Court would have considered the ques-

[5] Respondent Machinists Exhibit No. 2, p. 23 of Article 26.

tion as being moot and would have denied enforcemnt of the Board's order.

In Benz vs. Compania Naviera Hidalgo, 32 LRRm, 2362 (CA 9), the Court of Appeals held in analagous factual situation to the one here, and where an interlocutory injunction had issued, that the appeal of the interlocutory injunction had become moot and the Court had no right of action to pass upon the merit of the appeal. As the Court said:

". . . but the Court is not empowered to decide moot questions or abstract propositions or to declare for the Government of future cases, principles, or rules of law which cannot affect the results as to the thing before it."

This rule precisely states the position of the Respondent.

It is true that in *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, Local 911,* (107 NLRB No. 144), the Board said:

"The Board and the Courts have repeatedly held that the *secession* of unfair labor practices does not render a case moot." (Emphasis ours)

However, the Respondent in that case had ceased the unfair labor practices only after the Board had, under Section 10(1) of the Act, applied to the Federal District Court for an injunction, and the Court had issued a notice to show cause why a temporary order should not issue restraining violations of Section 8(b)(4)(A) of the Act. Moreover, the Board further contended that it was necessary to effectuate the purposes of the Act to prevent the recurrence of the Respondent's unlawful activity relying upon International Typographic Union, 86 NLRB No. 951, 961, where it said:

646 ". . . even if the post-injunction conduct be found legal, it could in no event render moot any unfair labor practices permitted prior thereto, because, apart

from other considerations, conduct engaged in under an injunction is necessarily ambiguous, it being impossible to determine whether such conduct is voluntary or springs from the compulsion of the injunction.''.

These cases are clearly distinguishable from the case at bar because here the Federal District Court for the Western District of Oklahoma in Civil Case No. 6428, denied the Board's request for a 10(1) injunction because before issuance of the Complaint, American Iron and Local 850, International Association of Machinists, AFL, had voluntarily entered into a complete and binding collective bargaining agreement which prohibited Respondent from striking for a period of one year. The Court found that there was neither ambiguity nor compulsion to enter into such an agreement, nor to require the secession of concerted action nor did such action by the parties spring from the compulsion of either the seeking of the injunction or the issuance of the Complaint.

Assuming arguendo that the Board did, in this case, issue against Respondent its Order in the same fashion as it did in Albert Evans, Trustee of Local 391, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, et al., (110 NLRB No. 122, page 2) where the Board limited the cease and desist order from ''inducing strike action by employees of any employer other than Thurston where the object thereof is to enforce any employer to cease doing business with Thurston''. Respondent is already under contractual limitation from taking any such action in view of the terms of the collective bargaining agreement now in effect—and intends no violation thereof, and no reason exists for such order.

This case is also distinguishable from Consolidated Edison Company of New York et al. vs. NLRB, 305 U.S. 197, because of the complete settlement of the controversy at issue. In the Consolidated Edison case, the em-

ployer could have, at any time after it ceased the unfair labor practices, continued to commit the same practices without any interference because there was no binding contract to prohibit these practices, while in this case there is a contract prohibiting the Respondent from striking.

Also distinguishable, is NLRB vs. Pacific Greyhound Lines, Inc., 303 U.S. 261. In that case, the question of mootness did not arise until after the Board had issued its cease and desist order. However, in this case, the controversy was moot even before the Complaint was issued.

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The Trial Examiner cites three cases in support of his denial to dismiss the Complaint on the grounds of mootness (Mexia, Spitzer and McGraw). These cases are clearly inapplicable to the factual circumstances of the case at bar.

In NLRB vs. Mexia Textile Mills, Inc., (339 U.S. 563, 567), the employer attempted to render the controversy moot only after the Board had issued its Order.

In NLRB vs. Spitzer Motor Sales, Inc., (211 Fed. 2d 235), the controversy was not settled and not moot because of the fact that the agreement of adjustment was not made until after the Board had tried the case on its merits and was awaiting a final decision and order from the Board.

And, in NLRB vs. F. H. McGraw & Co., (260 Fed. 2d 635) where the employer abandoned the unfair labor practices prior to the hearing, but unlike the case at bar, he was not bound by a contract to discontinue the practice during the term of said contract.

The dicta in Local 74, United Brotherhood of Carpenters and Joiners, AFL, et al. vs. NLRB, (341 U.S. 707, 715) is the only case directly on point with the facts and circumstances of the present case. In applying this dicta, this

case is now clearly rendered moot due to the fact the underlying dispute was resolved prior to the issuance of the Complaint.

CONCLUSIONS

For the aforegoing reasons, we respectfully urge the Board to reconsider its Decision and Order and dismiss the Complaint and since this problem is of such great magnitude, we respectfully request the Board grant oral argument on the question herein raised.

Respectfully submitted,

LOUIS P. POULTON

Louis P. Poulton,
Attorney, For and in behalf of Lodge 850, International Association of Machinists, AFL-CIO

Dated at Washington,
D.C., this 23rd day
of March, 1956

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650 **Order Denying Motion and Request**

On March 15, 1956, the Board issued a Decision and Order[1] in the above-entitled proceeding. Thereafter, on March 26, 1956, counsel for the Respondent in Case No. 16-CC-48 filed a motion for reconsideration of the aforesaid Decision and Order and requested leave to argue orally. By letter dated March 27, 1956, counsel for the Respondent in Case No. 16-CC-47 concurred in the said motion. The Board having duly considered the matter,

IT IS HEREBY ORDERED that the said motion be, and it hereby is, denied on the ground that nothing new has been presented that was not previously considered by the Board; and

[1] 115 NLRB No. 121.

IT IS FURTHER ORDERED that the aforesaid request for oral argument be, and it hereby is, denied.

Dated, Washington, D. C., April 19, 1956.

By direction of the Board:

FRANK M. KLEILER
Executive Secretary

1 **EXCERPTS FROM TRANSCRIPT OF TESTIMONY**

BEFORE THE NATIONAL LABOR RELATIONS BOARD,
SIXTEENTH REGION

Case No. 16-CC-47

In the Matter of:

GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION LOCAL NO. 886, AFL,

AND

AMERICAN IRON AND MACHINE WORKS COMPANY

Case No. 16-CC-48

In the Matter of:

LODGE NO. 850, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL

AND

AMERICAN IRON AND MACHINE WORKS COMPANY

Courtroom, Ninth Floor,
U. S. Post Office Building,
Oklahoma City, Oklahoma,
Wednesday, November 10, 1954.

Pursuant to notice, the above-entitled matter came on for hearing at 10:00 o'clock, a. m.

Before: SIDNEY L. FEILER, Trial Examiner.

APPEARANCES:

LEONARD L. PICKERING, Esq., 300 West Vickery, Fort Worth, Texas, appearing on behalf of the General Counsel.

FRANK GRAYSON, Esq., 410 Leonhardt Building, Oklahoma City, Oklahoma, appearing on behalf of respondent Teamsters.

2

EVERETT E. COTTER, Esq., 1706 First National Building, Oklahoma City, Oklahoma, appearing on behalf of the charging party.

LOUIS P. POULTON, Esq., Machinists' Building, Ninth Street and Mount Vernon Place, Northwest, Washington, D. C., and

STEVEN E. WILLIAMS, Grand Lodge Representative, Fort Worth, Texas, appearing on behalf of respondent Machinists.

* * * * * * * * * *

7 Mr. Pickering: At this time, Mr. Examiner, we'd like to ask the reporter to mark for identification the General Counsel's formal exhibits.

Mark as General Counsel's Exhibit 1-A the original charge, telegraphic charge, dated September 23, 1954, against Respondent Teamsters in Case No. 16-CC-47.

Mark as General Counsel's Exhibit 1-B the first amended charge, dated September 24, 1954, against Respond-
8 ent Teamsters in Case No. 16-CC-47.

Mark as General Counsel's Exhibit 1-C the affidavit of service of General Counsel's 1-B, which has return receipt attached thereto.

Mark as General Counsel's Exhibit 1-D the original charge against the Respondent Machinists, dated September 24, 1954, in Case No. 16-CC-48.

Mark as General Counsel's Exhibit 1-E the affidavit of service of General Counsel's Exhibit 1-D, which has a return receipt attached thereto.

Mark as General Counsel's Exhibit 1-F the complaint against Respondent Teamsters in Case No. 16-CC-47, dated October 23, 1954, with copies of original and amended charges attached thereto.

Mark as General Counsel's Exhibit 1-G the complaint against Respondent Machinists in Case No. 16-CC-48, dated October 23, 1954, with a copy of the original charge attached thereto.

Mark as General Counsel's Exhibit 1-H the order consolidating the cases and notice of hearing in Cases Nos. 16-CC-47 and 16-CC-48, which order is dated October 23, 1954.

Mark as General Counsel's Exhibit 1-I the affidavit of service of order consolidating cases and notice of hearing and the complaints in Cases 16-CC-47 and 16-CC-48, which affidavit of service has attached thereto return receipts.

Mark as General Counsel's Exhibit 1-J the answer of the Respondent Teamsters, dated November 1, 1954.

9 Mark as General Counsel's Exhibit 1-K the Telegraphic request of Respondent Machinists to postpone hearing until November 10, 1954.

Mark as General Counsel's Exhibit 1-L a telegraphic order of the Regional Director dated October 27, 1954, postponing the date of hearing to November 10, 1954, with confirmations of delivery attached.

Mark as General Counsel's Exhibit 1-M a motion for bill of particulars filed by the Respondent Machinists in Case No. 16-CC-48, which motion also contained a request for extension of answer time for the Machinists.

Mark as General Counsel's Exhibit 1-N a telegraphic order of the Regional Director extending the answer date of Respondent Machinists to November 8, 1954, pursuant to Machinists' request in its motion for bill of particulars.

Mark as General Counsel's Exhibit 1-O the telegraphic request of Respondent Machinists for further extension of answer time, dated November 2, 1954.

Mark as General Counsel's Exhibit 1-P telegraphic order of Regional Director denying requests of Respondent Machinists for further extension of answer time as contained in GC-1-O, dated November 2, 1954.

Mark as General Counsel's Exhibit 1-Q telegraphic message of Trial Examiner Sidney Feiler's ruling upon Respondent Machinists' motion for a bill of particulars, which is General Counsel's Exhibit 1-M, and which teletype

10 message is dated November 2, 1954.

Mark as General Counsel's Exhibit 1-R the bill of particulars, dated November 3, 1954, filed by counsel for

General Counsel pursuant to General Counsel's Exhibit 1-Q, which bill of particulars has attached thereto return receipts indicating service.

Mark as General Counsel's Exhibit 1-S Respondent Machinists' telegraphic request, dated November 3, 1954, for further extension of answer time and for postponement of hearing.

Mark as General Counsel's Exhibit 1-T the telegraphic order of Regional Director, dated November 3, 1954, denying the Respondent Machinists' request as contained in General Counsel's Exhibit 1-S.

Mark as General Counsel's Exhibit 1-U the Respondent Machinists' request for permission to appeal to Trial Examiner's ruling on respondents' motion for bill of particulars.

Mark as General Counsel's Exhibit 1-V a teletype message, dated November 8, 1954, from Frank M. Kleiler, Executive Secretary of the National Labor Relations Board, denying the Respondent Machinists' request to appeal the Trial Examiner's ruling on its motion for bill of particulars.

Mark as General Counsel's Exhibit 1-W the Respondent Machinists' answer, which answer is dated November 5, 1954, and stamped received by Sixteenth Region, Fort Worth, National Labor Relations Board, on November 8, 1954.

At this time, Mr. Examiner, I would offer the foregoing exhibits in evidence.

11

Trial Examiner: Is there any objection?

Mr. Grayson: No objection on the part of the Teamsters. If the Trial Examiner please, I think maybe we should point out that the respondent is listed as General Drivers, Chauffeurs, Warehousemen and Helpers Union, Local No. 886, AFL. For convenience I would like to refer to the respondent as Teamsters' Local 886.

Trial Examiner: Surely.

Mr. Poulton: I have no objection to the exhibits, but I would like the record to show on my statement that I re-

ceived my bill of particulars from the Trial Examiner and not from the Regional Office in Fort Worth.

Mr. Pickering: I might also, in connection with that, state for the record that the Respondent Machinists and the Respondent Teamsters and the charging party were each served by registered mail a copy of the bill of particulars and that I instructed my secretary to mail copies by regular mail to the attorneys of record in the case, Mr. Cotter for the company, Mr. Grayson for the Respondent Teamsters, and Mr. Poulton for the Respondent Machinists, and I understand that there was some slip-up either in the United States mail or by my secretary, so as the Respondent Machinists' attorney did not receive their copy.

Mr. Poulton: I would like to state I am not raising any issue as to that particular point.

Trial Examiner: There being no objection to the
12 receipt of the exhibits, they are received in evidence.

(Thereupon, the documents above referred to were marked General Counsel's Exhibits 1-A through 1-W for identification and were received in evidence.)

* * * * * * * * * * *

13 Mr. Poulton: Now, Mr. Feiler, I would like to make a motion to dismiss the complaint if I may.

Trial Examiner: All right.

Mr. Poulton: The respondent requests the Trial
14 Examiner to dismiss the complaint in its entirety as to the Machinists, Respondent Machinists, on the grounds that the controversy is now rendered moot.

On october 21, 1954, the American Iron and Machine Works Company and Lodge 850, International Association of Machinists, AFL, signed a collective bargaining agreement resolving all differences between the parties concerning the terms and conditions of employment. There's no longer any picketing; there's no longer any strike.

I would like to cite in support of this motion the case of Local 74, United Brotherhood of Carpenters and Joiners, AFL, et al, vs. NLRB—and I am sorry to say that my sec-

retary made a typographical error. She has it listed as 341 US 707. I am sure the reports don't go that high. I think it was 321, sir. It was decided in 1951.

In that case the Supreme Court had the same type of situation before it. It had a violation of Section 8 (b) (4) (A). There was picketing on a renovation project and the project ended. Now, at Page 715 the court states as follows:

"This case has not been rendered moot by the completion of the renovation project. The complaint was against petitioner's use of secondary pressure upon Watson's in a manner prescribed by the statute. The use of such pressure on this renovation project was merely a sample of what might be repeated elsewhere if not prohibited."

Here's the sentence that means quite a bit to me:

"The underlying dispute between petitioner's and Watson's has not been shown to have been resolved."

I take that to mean that the Supreme Court would have found the controversy moot if the underlying dispute had been resolved, and in this case the contract is settled, all differences are taken care of, and we consider this controversy as moot.

There is another case cited in 32 LRRM at Page 2362. It's Benz vs. Compania-Naviera Hidalgo—I think that's the proper pronunciation; I am not sure of that.

Trial Examiner: To be fair, you might spell it to the court reporter.

Mr. Poulton: B-e-n-z vs. C-o-m-p-a-n-i-a N-a-v-i-e-r-a H-i-d-a-l-g-o. The Ninth Circuit Court of Appeals held in that case that the court was not empowered to decide moot questions of abstract propositions or to declare for the Government future cases, principles of law which cannot affect the result as to the thing before it.

Now, the Board cites for authority as to these moot situations Consolidated Edison Company of New York et al. vs. NLRB 305 US 197.

In that case I should say the controversy was not actually settled. There was a ceasing of the unfair labor practice

at the time and it could have continued any other time. In this case we have a binding contract which I am ready to offer in evidence, and I think the General Counsel will stipulate that it is the contract between the parties resolving their differences, and therefore we consider this problem as being moot and without prejudicing ourselves we would not like to participate in the rest of the hearing through a prejudiced and moot question.

Trial Examiner: How about that, Mr. Pickering?

Mr. Grayson: If the Trial Examiner pleases, I think in order to save duplication we, on behalf of the Teamsters, desire to make the same motion to dismiss for the reason that the question is moot, and, of course, I don't know how the Trial Examiner is going to rule on it, but we would like to submit a brief on the question after the hearing.

* * * * * * * * * * *

Mr. Poulton: I would like to add something to my statement, Mr. Feiler. I think this would be a different proposition altogether if the injunction had been granted by the Federal District Court here, but that injunction was denied, sir, and I think that's another grounds for the controversy.

Mr. Grayson: If the Trial Examiner please, I would like to make a very few remarks in behalf of my motion to dismiss. The Respondent Teamsters in this case, inasmuch as the controversy between American Iron and the Respondent Machinists has been resolved, settled, are now handling the freight of the American Iron. There are no allegations in the complaint of the General Counsel of which the Respondent Teamsters could in any way be guilty of at this time. Furthermore, Section 101 of the Labor Management Relations Act sets forth the policy of the National Labor Relations Act and the Board that administers it, the purpose of which is to promote the free flow of commerce between the states and in substance to develop better relationship between management and labor, and we would like to point out, Mr. Trial Examiner, that the only

effect that this hearing could have would be to widen the chasm between labor and management and in all possibility to interrupt the flow of commerce in the future, and we think that this hearing is superfluous, that it should be dismissed, the question has been resolved.

Mr. Poulton: Mr. Examiner, if you would like to read the contract I am willing to offer it now at this time.

Trial Examiner: No, I'll take your word for it now, although you can offer it later if you want to. I'll take your word for that.

Well, I will deny the motion at this time. That doesn't preclude counsel from getting together whatever authorities they can and calling my attention to it either at the end of the hearing or in a brief, as you suggested, Mr. Grayson, later. That's my ruling at this time. Now, if you have——

Mr. Poulton: Mr. Feiler, at this time I would like to ask for a recess so that I can request the Board to permit me to appeal your ruling on the moot question, if I may.

* * * * * * * * * * *

Trial Examiner: All right, now, let's go back to Mr. Poulton's application. I certainly don't want to stand in your way to get an appeal off to Washington. By the same token, I don't want to hold up the whole case until we get a ruling. What do you want, about a half hour?

Mr. Poulton: About a half hour would be fine, sir. It will just take a few minutes to write up the telegram.

Trial Examiner: All right. Do you have much more, Mr. Pickering, before you would be ready to call your first witness?

* * * * * * * * * * *

Mr. Pickering: At this time General Counsel would offer an amendment to Respondent Machinists' complaint in Case No. 16-CC-48 and moves to amend said com-

plaint by adding a new paragraph to be enumerated as Paragraph 12 (a), to allege:

"On or about October 18 or 19——"

Trial Examiner: Excuse me. Are you sure it's 12?

Mr. Pickering: I am adding, in other words, inserting a new paragraph, Mr. Examiner, to be enumerated as 12 (a).

Trial Examiner: Twelve here is a sort of summary paragraph referring to four other paragraphs. I just wondered if that's what you had in mind, that's all.

Mr. Pickering: I might state in that connection, Mr. Examiner, that there is no connection between Paragraph 12 and Paragraph 12 (a). However, it's my desire that Paragraph 12 (a) come before Paragraph 13, and that is the purpose for amending it in that form.

Trial Examiner: All right.

Mr. Poulton: May I make a suggestion so we won't be confused. Would it be just as well or easy, since Paragraph 12 is a summary, to number it 11 (a) and then we'd have it between that and the summary.

Trial Examiner: You decide where you want it to come in, Mr. Pickering.

Mr. Pickering: It could be enumerated, Mr. Examiner, as 11 (a). It will allege as follows:

"On or about October 18 or 19 the Respondent Machinists, by its agents, two pickets, Johnny Roth and an accompanyinng picket whose name is unknown to the General Counsel, did picket on the premises of Lee Way around an American Iron truck, while the American Iron truck was present on the premises of Lee Way delivering a shipment of freight to Lee Way."

That will conclude that paragraph.

Trial Examiner: Any objection to the amendment?

Mr. Poulton: At the moment I would like to object—I may withdraw my objection later, and in that case I would like to request permission to, if the—Let's have a ruling first. Go ahead.

Trial Examiner: Well, I'll grant the motion, again, with all these amendments, with the conditions that General Counsel will try to arrange his presentation so that matters of amendment come in towards the close of his presentation and also that counsel in his case for the Machinists will have the right to at least bring the matter to my
26 attention for additional time if he feels he needs it.

Mr. Poulton: Now, sir, I would like to make a motion to amend Respondent Machinists' answer in that we add Paragraph 11 (a) which would state, "Respondent denies generally and specifically, each and every, all and singular, the allegations in Paragraph 11 (a) of the complaint.

Trial Examiner: That's to include this new material?

Mr. Poulton: That's correct.

Trial Examiner: All right, that motion is granted.

Mr. Pickering: I move to amend the Machinists' complaint further by adding a new paragraph to be enumerated as Paragraph 11 (b), to state:

"By the conduct set forth above in Paragraph 11 (a) the Respondent Machinists did cause, induce and encourage the employees of Lee Way to engage in a concerted refusal in the course of their employment to handle freight from American Iron."

That concludes Paragraph 11 (b).

Trial Examiner: Any objection to this?

Mr. Poulton: I raise the same objection.

Trial Examiner: All right, I'll grant it with the same conditions.

Mr. Poulton: All right, sir, I would like to make a motion to amend the Respondent Machinists' answer by adding Paragraph 11 (b), which would state as follows: "The Respondent denies generally and specifically, each
27 and every, all and singular, the allegations and conclusions in Paragraph 11 (b).

Trial Examiner: That motion is granted.

Mr. Pickering: I would further amend the complaint against the Respondent Machinists so that at all points after Paragraph 11, where Paragraph 11 or 12 is referred to, that Paragraphs 11 (a) and 11 (b) be referred to also.

Trial Examiner: That motion is granted.

Mr. Pickering: And that at all places where carriers Gillette, Hall, Santa Fe and T. I. M. E. are referred to that Lee Way also be referred to.

Mr. Poulton: I would like to raise an objection. Is Mr. Pickering now stating in his bill of particulars wherever they mention——

Mr. Pickering: That's at all places from Paragraph 11 and 12 forward to the end of the complaint.

Mr. Poulton: To Paragraph No. 17, is that correct?

Mr. Pickering: That's correct.

Mr. Poulton: I still have the same objection, but——

Mr. Pickering: In other words, those are primarily the conclusionary paragraphs of the complaint.

Trial Examiner: That where you have all reference to the carriers, Gillette, Hall, Lee Way, Santa Fe and T. I. M. E., you have got Lee Way mentioned there in this group anyway, Paragraphs 12 and 13 mention it specifically.

28 Mr. Pickering: I believe that's correct, and I withdraw the offer of amendment as to Lee Way.

Trial Examiner: All right, then, your motion to provide in substance that all references to Paragraphs 11 and 12 in the sections beyond Section 11 in the Machinists' complaint shall include 11 (a) and 11 (b), I'll grant that motion.

* * * * * * * * * * * *

31 Mr. Pickering: Mr. Examiner, at this time I have one further exhibit I would like marked as General Counsel's Exhibit 1-X, which is the copy of the telegram sent by Respondent Machinists——

Mr. Poulton: And Respondent Teamsters.

Mr. Pickering: —and Respondent Teamsters to the Board appealing from a Trial Examiner's ruling on the respondents' motion to dismiss the complaints in 16-CC-47 and 16-CC-48.

Mr. Poulton: May I make a technical correction. It is a request to get permission to appeal.

Trial Examiner: All right, the exhibit will be received in evidence.

(Thereupon, the document above referred to was marked General Counsel's Exhibit 1-X for identification and was received in evidence.)

* * * * * * * * * *

32 Mr. Poulton: Respondent Machinists requests permission to amend its answer as to Paragraph 2, the respondent admits the allegations contained in Para-
33 graph 2 of the complaint; as to Paragraph 3 of the respondents' answer——

Trial Examiner: Of the complaint.

Mr. Poulton: No, as to Respondent Machinists' answer to Paragraph 3 of the answer we would like to change it and amend it to admit the allegations contained in Paragraph 3 of the complaint. Respondent Machinists would like to amend its answer as to Paragraph 5 of the answer to have it admit the allegations contained in Paragraph 5 of the complaint.

Trial Examiner: Does that conclude your amendment?

Mr. Poulton: That concludes my amendment.

Trial Examiner: All right, the application is granted and the answer is amended accordingly.

Mr. Pickering: You amended your answer to admit——

Trial Examiner: Two, three and five.

Mr. Pickering: Paragraphs 2, 3 and 5?

Mr. Poulton: Yes.

* * * * * * * * * *

34 Mr. Pickering: Mr. Examiner, by stipulation with counsel for the Machinists at this time I would

amend my complaint in Paragraph No. 6 to strike the word "freely" which appears in the last sentence of Paragraph No. 6, where it is stated, "In connection with said strike, the Respondent Machinists has freely picketed," the word "freely" appearing before "picketed" be stricken from my——

Trial Examiner: All right, any objection?

Mr. Poulton: No. I would like to add to that that is the complaint in 16-CC-48.

Mr. Pickering: That's correct, the Respondent Machinists.

Trial Examiner: All right, there being no objection; the motion is granted.

Mr. Poulton: At this time Respondent Machinists would like to amend its answer in Case 16-CC-48 to admit the allegations contained in the amended Paragraph 6 of the complaint.

Trial Examiner: Application is granted.

Mr. Pickering: I now propose by stipulation by and between Respondent Machinists, by its attorney and counsel for the General Counsel, that at no time material to the complaint has the Respondent Machinists been the collective bargaining representative of any of the employees of American Iron who have picked up freight for American Iron at the common carriers' places of business, which common carriers are mentioned in the Machinists' complaint or deliver freight of American Iron to the
35 aforesaid common carriers for transportaion; that there is no dispute between the Respondent Machinists and American Iron concerning the wages and hours or terms or conditions of employment for such employees of American Iron; that in furtherance of its dispute with American Iron referred to in Paragraph 6 of the complaint the Respondent Machinists, since on or al at September 15, 1954, has followed American Iron's trucks driven by employees of American Iron who are not within the bargaining unit represented by the Machinists to the dock terminals and loading facilities of the aforementioned com-

mon carriers named in Paragraph 5 of the complaint and has maintained a picket or two pickets around American Iron trucks while the trucks of American Iron were present on the common carriers' premises, delivering or picking up freight, and that said pickets at the time of their picketing were upon the premises of the common carriers mentioned in Paragraph 5 of the complaint and picketed in close proximity to the truck of American Iron; that ordinarily before the dispute which arose between American Iron and the Respondent Machinists September 15, 1954, that the respective carriers mentioned in Paragraph 5 of the complaint ordinarily picked up freight and delivered freight at the places of business of American Iron, and that very occasionally when an emergency shipment needed to be transported to one of the respective carriers, that during the daylight hours an employee, Bill Hancock,

36 who was classified as a mail driver and drove a pick-up truck, would carry such occasional emergency shipments, and that upon occasions of an emergency shipment being too large to be carried upon the mail pickup truck, that a truck driver represented by the Machinists would carry such emergency shipment to the premises of the respective carriers, it being fully understood that such emergency shipments occurred rarely and infrequently, and that ordinarily all shipments and deliveries were picked up and delivered at the American Iron premises by agents of the respective carriers, and that if an emergency shipment at night needed to be transported to the premises of a carrier such occasional emergency shipment would be carried to the premises of the carrier by a shipping clerk or clerks who are represented by the Respondent Machinists in the job as a shipping clerk.

Trial Examiner: Does that end your stipulation, Mr. Pickering?

Mr. Pickering: I believe that concludes the stipulation.

Trial Examiner: How about that, Mr. Poulton?

Mr. Poulton: I will so stipulate, sir.

37 Mr. Pickering: Paragraph 10 be amended to read:

"That on or about September 17, 1954, the Respondent Machinists maintained a picket on the premises of Lee Way around an American Iron car and trailer during the time that an employee of American Iron was present on Lee Way premises delivering an American Iron freight shipment with an American Iron car and an American Iron trailer, which American Iron car had a round American Iron emblem approximately twelve inches in diameter upon the front door panels of the car and a smaller emblem of American Iron on either side of the American Iron trailer."

That will conclude the amendment of Paragraph 10.

Trial Examiner: Let the court reporter read that back and if there isn't a word or two there exactly the way you want it, make the corrections as we go along.

(Read.)

Trial Examiner: Any objections to the amendment?

38 Mr. Poulton: No objection.

Trial Examiner: There being none, it is granted.

Mr. Poulton: At this time the Respondent Machinists would like to amend their answer in Case 16-CC-48, Paragraph 10 of the answer, be amended to admit the allegations contained in Paragraph 10 of the complaint.

Trial Examiner: Motion is granted.

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39 Mr. Poulton: I have a stipulation to gree to.

Mr. Pickering: Stipulation rather than amendment?

Mr. Poulton: Yes, sir, stipulation. The proposed stipulation between the General Counsel and the Respondent Machinists reads as follows:

"The operation of pickets was as follows: the pickets came from a car when the American Iron truck arrived at the carrier's premises, put on a picket sign and walked in a 'U' shape from the dock around the truck back to the

dock on the other side and continued this operation in close proximity around the truck and car and trailer of American Iron only while the vehicles were on the carrier's premises. The pickets left when the trucks left."

Mr. Pickering: General Counsel will so stipulate.

* * * * * * * * * * *

Mr. Poulton: Another stipulation between the General Counsel and the Respondent Machinists reads as follows:

"The pickup truck referred to in the complaint, American Iron which delivered freight to the common carriers had on each side of the doors of the truck an American Iron sign approximately twelve inches in diameter."

Mr. Pickering: General Counsel so stipulates.

Trial Examiner: That goes back to Paragraph 10, I think, doesn't it, of the Machinists' complaint? Is that what that refers to?

Mr. Pickering: There's more than one paragraph; as I understand his proposed stipulation will go to all parts of the complaint where an American Iron truck is referred to or American Iron car.

Trial Examiner: Then, as I understand it, it's agreed then that——

Mr. Pickering: All American Iron vehicles had this twelve inch American Iron emblem upon the side.

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Trial Examiner: Paragraph 10 was amended to indicate that—everything I am saying now is subject to correction—Paragraph 10 originally set forth that the shipment was made by a private car and trailer. There was an amendment to indicate that the shipment was made by a duly marked American truck and trailer, is that correct?

Mr. Pickering: That's correct.

Trial Examiner: And as so changed it was admitted.

Mr. Poulton: That's correct, sir.

Trial Examiner: And as to that incident there was that "U" shape picketing.

Mr. Poulton: And I think there is a further part of the stipulation that the picketing was around the American Iron truck in the "U" shape.

Mr. Pickering: If it wasn't General Counsel would stipulate that at this time.

Mr. Poulton: I think it was.

Trial Examiner: All right. Now, Paragraph 11——

Mr. Pickering: That is admitted, is that correct, ten is admitted?

Mr. Poulton: Ten is admitted; not eleven.

Trial Examiner: Ten is admitted. Now we go to eleven, which alleges an incident of requesting an employee of Santa Fe to see to it that American Iron freight was not handled. That's denied, is that right?

Mr. Poulton: That is correct, sir.

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50 Mr. Poulton: I propose the stipulation between General Counsel and Respondent Machinists as follows:

"On or about October 18 or 19 Machinists, by its agent, maintained a picket and did picket the American Iron truck while it was on the premises of Lee Way delivering freight, American Iron freight," I should say.

Mr. Pickering: I would agree to that stipulation, Mr. Examiner, with this clarification, that this picket picketed upon the premises of Lee Way in a "U" shape around the American Iron truck.

Trial Examiner: Is that agreed to?

Mr. Poulton: I will agree to that, yes.

Mr. Pickering: In close proximity to the truck.

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55 **James Oliver Gray.**

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct examination.

56 By Mr. Pickering:

Q. Would you state your full name and address for the record, please. A. James Oliver Gray, 1520½ Northwest 33rd.

Q. That's Oklahoma City? A. That's right.

* * * * * * * * * *

By Mr. Pickering:

Q. And you are an employee of American Iron and Machine Works? A. Yes, sir.

Q. And you were such an employee during the months of September and October of this year, is that correct? A. Yes, sir.

Q. What are your job duties ordinarily? A. Ordinarily I work in the inventory department, but during the strike I was working out—working in the shipping department as a helper and deliverer.

Q. What did you do in that connection? A. Oh, I helped box these shipments and load them on these delivery trucks and then helped deliver them around to the different carriers.

Q. In making deliveries to different carriers did you accompany Mr. Bill Hancock on occasions? A. Yes, sir, I was with him, I believe, every evening that we went out.

Q. And Mr. Hancock is the driver of a mail pickup
57 truck for American Iron? A. Yes, sir.

Q. Now, when was the first occasion that you accompanied Mr. Hancock to the carriers with American Iron freight?

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The Witness: I don't know whether it was the first or second day of the strike.

Mr. Pickering: It will be stipulated, I believe, it is admitted by way of the answer that the strike did start on September 15, 1954.

Trial Examiner: Is that agreeable?

Mr. Poulton: That's correct.

Trial Examiner: So on either September 15 or 16 you went, first went on the delivery truck, is that right?

The Witness: Yes, sir.

By Mr. Pickering:

58 Q. On that date to what carriers did you go? A. Santa Fe, Gillette, I believe T. I. M. E. I can't remember all of them. Santa Fe and Gillette and T. I. M. E., and I don't know whether we went to Railway Express.

Q. Did you go to Lee Way or D. C. Hall on that date? A. I believe D. C. Hall was on the first trip. I don't remember Lee Way.

Q. Did anything unusual occur during the time that you were making the deliveries at any of these carriers? A. At Santa Fe Mr. Foster and Mr. Williams, Chapman Williams, accompanied us out there and Mr. Foster——

Q. Before going further, would you state who Mr. Foster is. A. Well, I understand he's the business representative for the union, the Machinists Union.

Mr. Poulton: The respondent will stipulate that Mr. Foster is the business representative of Local 850, International Association of Machinists, A. F. of L.

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59 By Mr. Pickering:

Q. What did Mr. Chapman Williams do? A. Williams picketed our truck that evening around——

Q. Did he wear a picket sign, an apron? A. Yes, sir.

Q. Will you describe that to the Examiner, please, the

picket apron. A. Well, it had their IAM Machinists on strike, A. F. of L., I believe.

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65 Q. Who said that? A. Mr. Foster.

Q. Was there anything said between Mr. Foster and this dock hand as to accepting or not accepting your freight shipment? A. Well, I didn't actually hear that, hear anything to that effect at that time.

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73 Trial Examiner: Can we have an agreement as to when that strike ended? We know when it started; September 15.

Mr. Poulton: October 21, 1954.

Trial Examiner: What?

Mr. Poulton: October 21, 1954, the strike ended, including the picketing, all picketing.

Trial Examiner: Is that agreed?

Mr. Pickering: Yes, sir, General Counsel will stipulate to that.

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75 Cross-examination.

By Mr. Poulton:

Q. On each delivery that you made to the carrier, were you accompanied by Mr. Bill Hancock? A. Yes, sir.

Q. And he drove the truck at all times? A. Yes, sir.

76 Q. Which truck did you use, sir? A. The green pickup truck.

Q. Which one, sir? A. The green pickup truck.

Q. Does that truck have signs on it? I think we have stipulated to it. Is that the truck that has the signs on it? A. Yes, sir.

* * * * * * * * * *

84 Q. Now, you stated that Mr. Foster at Santa Fe on September 15 or 16 went up on the dock looking

for a steward, is that correct, sir?. A. Well, I didn't know whether he was really looking for a steward or [redacted], but he went up on the dock looking for someone, I presume.

Q. He didn't tell you he was going up to look for a steward, did he? A. He never spoke to me personally.

Q. Then you don't know who he was looking for if he was even looking for someone, do you? A. I presumed he was looking for someone or he wouldn't have gone up on the dock.

Q. But you don't know as a known fact that he was looking for anyone? A. After Mr. Smith came out and Edd spoke to him and they got to talking, and that's where I presumed he was looking for someone with authority.

Q. You say he talked to Mr. Smith, is that correct? A. I believe it's this gentleman right here, if this is Mr. Smith.

Q. Do you know what Mr. Smith's capacity with Santa Fe is?

Mr. Pickering: We'll stipulate that it is Mr. J. C. Smith who has been referred to as the freight agent for Santa Fe Trails Transportation Company, Oklahoma City.

85 Mr. Poulton: May I inquire whether he was in charge of the office?

Mr. Pickering: Yes, he is in charge of the office in Oklahoma City.

* * * * * * * * * *

87 Q. Now, was anybody else nearby when that conversation took place, referring to the Smith and Foster conversation?. A. I think there were two other men. I didn't notice.

Q. Do you remember who they were? A. No, sir.

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89 Q. Can't remember. All right, now, on September 15 or 16 you left Santa Fe and you went to Gillette, is that correct? A. I believe.

Q. That's what you testified. A. I did? O. K.

Q. And you told that you were followed from Santa Fe to Gillette by Mr. Foster or anyone else? A. Mr. Foster and Chapman Williams went over there with us.

Q. What kind of car did he use this time? A. He had his Mercury. That was in this Mercury.

Q. Had the Mercury? A. Yes, sir.

Q. What happened when you pulled up to the dock? A. Well, we started to unload and Chapman Williams was picketing our truck and Edd Foster went inside and was talking to this foreman and——

Q. Do you know what the foreman's name is? A. No, I can't recall his name.

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92 Q. You just supposed he was a foreman, didn't you? A. Well, yes.

* * * * * * * * * * *

95 Q. Didn't have any door on the truck. Now, I believe the next stop you made was T. I. M. E., is that right? A. That's right.

Q. And I believe you stated this time Mr. Foster talked to a dock hand, is that right? A. I presume that's who he was.

* * * * * * * * * * *

99 Q. Now, do you know, could you tell us exactly what the dock hand said and exactly what Mr. Foster said, give us the conversation? A. Well, I don't
100 know what the dock hand said. He had a two-wheeler in his hand.

Q. A what, sir? A. A two-wheeler, pushcart, whatever you call them, and I heard Mr. Foster say something about he would lose his union card or his place in the union.

Q. Were they the exact words that Mr. Foster used? A. I remember hearing the union card and——

Q. You heard union card, that's all you can actually remember? A. No, I heard something about losing the union card.

Q. Just what were the context of those words, if you remember, what order? A. Well, I couldn't say what order he called it; he would lose his position or his—I don't know whether he was a steward or what it was, but I remember hearing him say he would lose something in connection with the union.

Q. Lose something; what? A. Well, it was with his union card or his position in the union.

Q. What did Mr. Foster say? A. That's what Mr. Foster——

Q. He said he would lose either his card or the union position? A. Not both.

Q. Which one did he say? A. I couldn't say.

101 Q. You don't remember that, is that correct? A. I couldn't get which one he meant, whether he meant his union card or his position in the union.

Q. What were the words that Mr. Foster used? A. Well, I just got in about—

Mr. Pickering: I object, Mr. Examiner, repetitious. The witness has answered time and time again.

Trial Examiner: I will allow it. Tell us once; this is final. What did you hear Mr. Foster say to this other man, if anything?

The Witness: Well, I didn't get in on the first part of it, but I heard Mr. Foster say that—I cut in on "lost your union card" or his position, I heard the words lose and union and that's about it.

By Mr. Poulton:

Q. So, in other words, you heard words lose and union and that's all, sir? A. Well, there was a couple of others in that that I couldn't say which position or where they were exactly.

Q. All you can remember is lose union. A. That's what I remember.

Q. Was there anything else in that conversation that you overheard? A. No.

102 Q. You didn't hear any more. I have here the next stop on September 15 or 16 you went to D. C. Hall. A. Yes, sir.

103 Q. Is that correct? A. Yes, sir.

Q. Exactly what happened there, sir, would you tell me? A. Well, as we backed up to unload, Chapman Williams picketed our truck and Edd Foster was standing out by the side of it, oh, ten or fifteen feet from there, and one of the dock hands wheeled a two-wheeler up there to take our boxes and Edd told him no, he couldn't help us, and this dock hand backed off and left.

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110 Q. Now, referring you to the D. C. Hall delivery, approximately a week after you made the other delivery, was Mr. Hancock with you at that time? A. Yes, sir.

Q. What did he do when he pulled into the dock? A. Well, Mr. Hancock got up on the dock and he was sorting out freight bills, and Cleve Dodd and I threw out a couple of casing wagons and a carton, I think, two or thr e items, and this man on the dock said that he couldn't help us at all tonight, and so I went over there and I told Mr.
111 Hancock what he said and he says, "Well, we'll see what we can do," and Mr. Hancock went up to the office and we just sat there then waiting to see what was going to—whether they were going to take it or not, and one of the dock hands asked Edd Foster what he was doing for the good of the country and Edd Foster says he's trying to raise the wages of the workingman. This dock hand says, "Well, we'll help you," and pretty soon, I guess ten minutes approximately, Mr. Hancock came back from the office and says, "Well, let's go," so we took the shipments back to American Iron and unloaded them and picked up non-union freight and hauled it.

Q. Now, did Mr. Foster say anything else at that time? A. Oh, he was talking to George Wimberly; I couldn't hear anything.

Q. He didn't talk to anybody else on the dock, did he? A. I don't think so.

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113 By Mr. Poulton:

Q. Now, I believe you stated you went to Gillette on approximately September 24? A. Well, we went to Gillette about every night, almost.

Q. Could you tell me when Mr. Bob Pickett was at Gillette picketing your truck? A. I couldn't say the exact day that he was there, but he was there at Gillette on several occasions.

Q. I believe you said that Mr. Pickett was a picket captain? A. That's what I understood Mr. Pickett was doing, he was picket captain.

Q. What gave you the idea he was a picket captain? A. Well, I never saw him walk the picket and he usually seemed to be in charge of the pickets out in front of the shop and when he'd take them after us.

Q. By shop you are referring— A. American Iron.

Q. Now, I believe you stated you saw Mr. Pickett get up on the dock, is that correct? A. Yes, sir.

Q. And I believe you stated Mr. Pickett talked to this other employee, is that correct? A. I saw him talk to one or two persons. I don't remember exactly how many.

Q. Did you hear what he said? A. No, sir.

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121 Further redirect examination.

By Mr. Pickering:

Q. Mr. Gray, how close were you to this picket sign? A. Oh, sometimes when I'd get off the truck I'd be standing right next to the picket.

Q. Approximately how many times would you estimate prior to the hearing that you saw the picket sign that was worn at the carriers' premises? A. Oh, half a dozen days at half a dozen different places each day, approximately.

Q. And on none of those occasions did you see this lettering at the bottom of the sign saying we do not ask any employees to cease work, is that correct? A. I never did see it during that time.

Q. Now, this sign that you saw here in the courtroom and were shown by Mr. Poulton on the 16th of October, would you tell us how big that lettering or wording was that said would not ask anyone to cease work? A. I'd say the lettering was approximately a half inch to three quarters high. Half inch, more closer to a half inch.

Q. What was the size of the IAM? A. I'd say IAM was an inch to an inch and a half long letter, approximately.

122 Q. How about on strike? A. On strike was the largest lettering, I believe, approximately three inches, I believe, or maybe more.

Q. Was there anything on the picket sign that indicated who they were on strike against? A. No, sir.

Q. Was there anything on the picket sign that indicated why they were on strike? A. No, sir.

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Mr. Poulton: I have only one copy of this exhibit, I am sorry to say. Would you mark that, please.

(Thereupon, the document above referred to was marked Respondent Machinists' Exhibit No. 1 for identification.)

Further recross-examination.

By Mr. Poulton:

Q. I show you what has been marked as Respondent Machinists' Exhibit No. 1. Is this the sign that you were referring to that I showed you in the Federal District Court at the hearing on October 16? A. It looks like it.

Q. Similar size? A. Similar size.

Mr. Poulton: I would like to offer that, now, sir.

123 Trial Examiner: Any objection?

Mr. Poulton: I will identify that later again.

Mr. Pickering: No objection.

Trial Examiner: There being no objection, it is received in evidence.

(The document heretofore marked Respondent Machinists' Exhibit 1 for identification was received in evidence.)

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128 **Edd C. Foster.**

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Pickering:

Q. Would you give your name and address to the reporter, please. A. Edd C. Foster, 820 Southwest 50th, Oklahoma City, Oklahoma.

Q. What is your occupation, Mr. Foster? A. Union representative at this time.

Q. With what union are you connected? A. International Association of Machinists, Local 850.

Q. Local 850, and that is the same union that is the respondent in this case, isn't that correct? A. Yes, sir.

Q. Has been referred to here as Respondent Ma-
129 chinists? A. Yes, sir.

Q. Now, what is your official title? A. Business representative of Local 850 of the International Association of Machinists.

Q. How many business representatives are there in Local 850? A. I am the only one.

* * * * * * * * * *

By Mr. Pickering:

Q. You are the Mr. Edd C. Foster who is named in the complaint as having made certain statements to employees of carriers here in Oklahoma City, of Santa Fe,

Gillette, T. I. M. E., Hall and Lee Way? A. I was
130 named in the complaint.

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134 By Mr. Pickering:

Q. All right, Mr. Foster, did you have occasion during the period of the strike from September 15 until the settlement of the strike about October 22 of this year to go to the premises of Santa Fe Trails Transportation Company here in Oklahoma City?

* * * * * * * * * * *

A. Yes, sir.

By Mr. Pickering:

Q. When was the first such time that you went to the premises of Santa Fe Trails from or after September 15? A. It would be on September 17.

Q. September 17? A. Yes, sir.

Q. That would be the second day of the strike? A. It would be the third day, I believe.

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135 Q. What did you do first upon arriving at the premises of Santa Fe? A. I let Chapman Williams out of the car, who was in the car with me, and——

Q. Were you in your car or someone else's car? A. My car.

Q. What kind of car do you have? A. '52 Mercury Custom.

Q. What color is that car? A. It's a very light tan, I believe, or a cream, almost white; very light color.

Q. Did anyone else accompany you to Santa Fe premises other than Chapman Williams on September 17? A. No, sir.

Q. All right, what did Chapman Williams do after you let him out of the car? A. He went to the American Iron pickup that was backed up to the dock, and he put on a

picket apron and picketed the—in the "U" around the front of the pickup, around the front of the side of the pickup, close proximity, I believe it is, thereof.

. . . . . .

136 Q. Mr. Foster, why did you go to the premises of Santa Fe? A. To take Chapman Williams down there to pick up the American Iron pickup.

Q. All right, did you have any other purpose for going down to Santa Fe? A. No, sir, not that day.

Q. On September 17? A. Not that day.

Q. All right, sir. Then why did you go up on the dock of Santa Fe? A. I went up on the dock at Santa Fe to tell the dock steward, if they had one, that the picket was there and only on the American Iron equipment.

Q. What was your purpose in telling the Santa Fe dock steward, if they had one, that the picket was there and on the American Iron truck? A. I didn't see a Santa Fe dock steward.

Q. Well, you stated that was your intention. A. That's right.

Q. Did you intend to tell the Santa Fe dock steward, if they had one, that the picket was there and that it was on the American Iron truck? A. So there would be no

137 misunderstanding whatsoever. We have an agreement with Santa Fe Trails Transportation Company and I didn't want the dock stewards to think that we were on strike against the Santa Fe Trails.

Q. Did you find the Santa Fe dock steward? A. No, sir.

Q. All right, what was your purpose in taking a picket down to the premises of Santa Fe to picket the truck of American Iron? A. Simply to advertise with the picket on the equipment.

Q. Why did you want to advertise with the picket on the equipment? A. So the people would know.

Q. Why did you want people at Santa Fe to know that you were on strike? A. I wanted everyone involved to know that we were on strike.

Q. In particular why did you want the people of Santa Fe to know that you were on strike at American Iron? A. I don't know as we wanted them in particular more than any other general group.

Q. Why did you want Santa Fe to know, regardless of why you, any comparisons why you might have wanted anyone else to know, why did you want Santa Fe to know you were on strike, the Santa Fe employees, people at Santa Fe? A. I just hadn't given it any thought.

Q. Why? A. I just hadn't given it any thought
138 of why.

Q. Well, you have given some thought enough to take a picket down to Santa Fe, hadn't you? A. Surely.

Q. You hadn't thought why you were taking that picket down there? A. We were putting a picket on the American Iron equipment at its various places to advertise that that company and equipment and all was on a strike.

Q. That company, equipment and all was on strike. Now, how is that equipment on strike? A. Because it is being used as a segment of bargaining unit work.

Q. And this was a mail truck driven by Mr. Bill Hancock, was it not? A. That was at that time not a mail truck.

Q. What was it? A. That was a truck used for hauling materials to and from American Iron and Machine Works and further.

Q. Wasn't that the same truck that was used at American Iron to haul mail to the Post Office?

Mr. Poulton: May I interject, Mr. Feiler, I wish Mr. Pickering would let the witness finish his answer.

Trial Examiner: Did you finish your last answer?

The Witness: No, I didn't.

139 Trial Examiner: All right, pick it up from there.

By Mr. Pickering:

Q. Finish, then, please. A. The work being done at that time was part of our bargaining unit work at American Iron and Machine Works Company. We have a, so to speak, door to door certification at that company. We

represent the employees handling the materials and things like that, but we had at that time other people who were not normally bargaining unit people handling the work, and I wanted the people to know, all people.

Q. And it's your testimony that normally you had people taking freight down to Santa Fe in your bargaining unit, is that your testimony? A. Normally?

Q. Yes, sir. A. If freight was hauled to Santa Fe in any amount such as this it would be bargaining unit work, yes, sir.

Q. Well, is it your testimony that normally freight was hauled to Santa Fe by people in the bargaining unit that you represented at American Iron? A. Normally the freight is hauled from American Iron by Santa Fe, I believe.

Q. It's very rare occasions that anyone or any individual at American Iron whom you represent hauled freight to the docks of Santa Fe here in Oklahoma City, isn't that right?

A. It's a rare occasion, but this was an expanded
140 occasion of that. These were people——

Q. Primarily, Mr. Foster——

Mr. Poulton: Just a minute, Mr. Pickering, let him finish his answer, please.

Trial Examiner: Go ahead.

A. This was an expanded occasion whereby people we do represent, people doing bargaining unit work, were carrying the freight.

By Mr. Pickering:

Q. Now, what occasion are you referring to when you say this was an expanded occasion? A. I am referring that this is not normally hauled in that particular manner and that it was being hauled at that time and any time in the future that that's hauled it will be bargaining unit work whether it's on strike or not.

Q. Have you reached some agreement with American Iron to that effect? A. We don't have to. We are certified

by the National Labor Relations Board as the bargaining representative of those people.

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144 Q. Did you picket at any premises in Oklahoma City that you didn't think were represented by Teamsters? A. I don't know whether we picketed
145 any of them that were not represented or not.

Q. Did you picket the premises of J. H. Rose? A. I don't recall picketing.

Q. J. H. Rose is a non-union place, is it not? A. I don't know, but they cross our picket line rather vividly, I'll put it that way.

Q. And you didn't picket at J. H. Rose, did you? A. No, sir.

Q. Why didn't you picket at J. H. Rose? A. They cross our picket line all the time, the employees of that company.

Q. Why didn't you want to make it known at J. H. Rose that American Iron was on strike? A. J. H. Rose certainly knew it. I think many of his employees had been through our picket line.

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151 By Mr. Pickering:

Q. Let me ask you, Mr. Foster, wasn't at least one of the reasons that you placed a picket on the premises of Santa Fe on September 17 and one of the reasons that you wanted to advertise with that picket that you hoped by that action that you would be able to induce the employees of Santa Fe to refuse to handle the freight of American Iron; wasn't that one of your reasons?

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A. I hoped they wouldn't get on the truck and do that work, yes, sir.

By Mr. Pickering:

Q. You hoped they wouldn't get on the truck and
152 help unload your freight? A. I hoped they wouldn't yes.

Q. Didn't you also hope that they wouldn't handle the freight once it was placed on the dock if it was placed on the dock? A. I think I could say yes, I hoped they wouldn't.

Q. And didn't you also hope that Santa Fe drivers would refuse to haul that freight? A. I never give it a consideration in relation to that.

Q. Now, Mr. Foster, you stated you called upon the dock. What did you do immediately after you called upon the dock?

Mr. Poulton: May I, before he answers the question, have a qualifying question as to what dock you are talking about.

Mr. Pickering: Santa Fe dock; all of these questions are directed at the September 17 incident at Santa Fe. A. I walked out in the middle of the dock area, warehouse area.

By Mr. Pickering:

Q. What did you do when you got out to the middle of the dock area? A. A fellow came by, I asked him where the dock steward was.

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154 Q. How many people said anything to you? A. Oh, possibly, I don't know, possibly one. I think the —possibly the one that told me the dock steward, if I recall properly, if my recollection is correct, he told me the dock steward wasn't there and probably wouldn't be there for 20 minutes or he had been gone for 20 minutes, at least it was 20 or 30 minutes away one way or the other. He told me that. When he did I started to leave and there was another fellow that mentioned something about the freight movement, but I didn't hold a conversation as such. I didn't ask anyone to—not to handle the freight.

Q. You didn't ask anyone not to handle the freight? A. No, sir. I talked with Mr. Smith at the door. I don't remember the initials. I think he's manager there. He came over and introduced himself to me, and there was a small discussion there.

Q. All right, when you weren't able to talk to the dock steward; now, what did you say your purpose was wanting to talk to the dock steward? A. Oh, I wanted——

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155 A. I wanted to tell the dock steward that we had a picket on the American Iron truck there.

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157 Q. All right, suppose, Mr. Foster, you start in and tell us what you said and what Mr. Smith said on this occasion, September 17.

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158 A. As best I recall we were standing in the doorway or the dock area and there was three, I guess you would call them, employees.

By Mr. Pickering:

159 Q. Wait a minute, wait a minute, I want what you said, what Mr. Smith said. I don't want anything else except what you said and what Mr. Smith said. That's my question. A. Well, Mr. Smith came over to me and I believe he said "My name is Mr. J. H." or J. W. Smith, or something to that effect, and stuck out his hand. I shook hands with him, told him, "My name is Edd Foster, business representative of the Machinists."

I believe he stated also at that time he was the manager. Mr. Smith told me that, without any statement on my part, told me that we'll have to go on and take the freight, or something to that effect, indicating he was going to go on and take it, and I didn't say yes, no, or otherwise in relation to that.

He said, "You are on private property here, picketing private property, and I want you to get off." I didn't answer back, and after, oh, possibly three times him stating you are on private property, get off, something to that effect, why, I told him, "Well, just throw me off."

Trial Examiner: What was that?

The Witness: I told him that I would leave——

Trial Examiner: Go ahead.

The Witness: I told him that I would leave whenever the picket left, that I would leave, take the picket and leave. I did not ask him not to handle the freight. There might have been other minor conversations that I—I mean other words spoken, I don't recall exactly, but he got rather obnoxious with this get off the private property deal,
160 and I—it's possible I could have told him that "You allow the company equipment to come on here, why I see no reason why you shouldn't allow the union to come on here with him." I told him that as soon as the equipment left I'd be gone, take my picket and go.

That was in the presence of, I think, two other management employees that was there with him. They were both dressed up and indicated to be management, one big rather heavy fellow was standing there in close—close to and behind Mr. Smith. They apparently were management employees, not any type bargaining unit employees. There was no one else close that I recall except the American Iron employees were out in the truck. The office employees that were doing our work, bargaining unit work, American Iron bargaining unit work.

Q. Now, you were standing on the dock where dock employees were working, weren't you? A. No, sir.

Q. Where were you standing? A. I was standing on the very edge of the east part of the dock and there was no dock employees close that I recall. That was some distance away from any regular dock employees. Outside of unless the management officials, unless you call Mr. Smith a dock employee, I believe you would class him as a management employee.

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166 Q. Now, on this same day that you related you accompanied a picket over to the premises of T. I. M.

E., did you not? A. Yes, I believe we were at T. I. M. E. on the 17th of September, yes, sir.

Q. Was it the same picket? A. Yes, sir.

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167 Q. All right. Now, the picket crawled out over there and picketed the truck at T. I. M. E.? A. Yes, sir, he picketed the American Iron pickup.

168 Q. He picketed around the American Iron pickup while it was there at T. I. M. E.? A. Yes.

Q. And that was on T. I. M. E. premises? A. I guess it was T. I. M. E. premises.

Q. It was backed up to the T. I. M. E. dock, wasn't it? A. Backed up to the T. I. M. E. dock.

Q. Now, what did you first do when you got there? A. Drove up and let Chapman Williams out, out of my car.

Q. What did you do next? A. Parked my car.

Q. All right, next? A. Went over to the dock.

Q. All right, just start in and tell us what all you did from the time you got there until you left the T. I. M. E. dock. A. I climbed up on the dock, went in the door, asked a fellow who was apparently working there where the dock steward was. The fellow answered that he was up, I believe, in the office at the time. I went up to the office and I, about that time a fellow came out of the office and I asked him if he was the dock steward. I believe that was the question I asked him, and he told me he was. I told him, "We have a picket on a hot-load of material out here."

Q. You told him you had a picket on what? A. Hot load of material.

169 Q. Hot load of material? A. I think that was probably what it was.

Q. Did you tell him anything else? A. No, sir.

Q. Are those your words that you used? A. I believe, as near as I can recall, those are the exact words.

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170 Q. Why did you want this dock steward to know that you had a picket on a hot load? A. I had the picket out there advertising, I wanted him to see it.

Q. You wanted to advertise that you had a picket on a hot load? A. I wanted to advertise that we were on strike against American Iron Machine Works Company. I wanted him to know it. We just so displayed the picket banner and I so told him.

Q. Well, now, one of the reasons that you wanted him to know that was that you hoped that the employees at T. I. M. E. wouldn't handle the American Iron freight, isn't that right? A. Oh, I hoped they wouldn't get in the pickup there and carry it off, I hoped they wouldn't, so to speak, get in behind the picket there and handle the merchandise. I hoped they wouldn't.

Q. Get behind the picket? A. Well, the picket on the truck there, I hoped they wouldn't get in the truck and be handling the stuff.

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173 By Mr. Pickering:

Q. Did you have the same purpose in picketing? Now, first, you did picket at T. I. M. E., at Lee Way, at
174 Hall, at Gillette and Santa Fe? A. I did not personally, no.

Q. You carried pickets and American Iron employees who were members of Machinists Union and who were out on strike and acted as pickets, you carried such pickets to these five carriers that I have just named where these different people picketed, isn't that right? A. What carriers did you name, please?

Q. During the time that the people that you represented American Iron were on strike didn't you carry pickets to these various carriers during that period of time? A. I carried a picket to Santa Fe, Gillette, T. I. M. E., Lee Way and Hall, yes, I did that.

Q. And you saw these pickets on these carriers' premises in close proximity to American Iron truck? A. I witnessed it, yes, sir.

Q. On various occasions? A. I wouldn't be so broad as to say various occasions.

Q. Well, there was more than one occasion at each carrier, was there not? A. Not necessarily, no.

Q. Was there any carrier where that only occurred once? A. I don't recall being at the Santa Fe dock over once. I may have been there twice, but I don't recall being there over once—but once.

175 Q. How about the other carriers? A. I was at Lee Way two or three times, something like that, possibly. I'll say numerous times. Would that help?

Q. Now, did you have the same purpose in carrying a picket to these premises and having this picketing done in the manner that you described, as you have stated your purpose was at Santa Fe on September 17? A. Yes, I wanted to advertise that we were on strike.

Q. And you had the same hopes to accomplish the same results by your advertising, isn't that right? A. I wouldn't say same results. I didn't know exactly what results were. I couldn't testify as to results. All I could say is that I think I'd be safe in saying I hoped they didn't get on the American Iron equipment and handle the freight.

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177 Q. Didn't you hope by the use of your pickets to cause people to cease doing business with Santa Fe or with American Iron? A. I'd say yes, I didn't want them doing business down there, coming down there crossing the picket line during the strike, sure, I would say that I hoped they didn't.

Q. And you hoped by the use of your pickets out on the premises of these carriers around Oklahoma City to cause people to cease doing business with American Iron at those places where these trucks were at, did you not? A. Any place any time that we picketed the American Iron

or American Iron equipment, which I feel is a part of American Iron, is an integral part of American Iron, I hoped they wouldn't get in the trucks or otherwise handle or do business and do our people's work, certainly I hoped that no one would do our work while we were on strike. We were not fortunate enough, of course, to keep that from happening.

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184 Q. Now, Mr. Foster, on the same day you went over to Gillette with this picket, didn't you? A. I think that's correct.

Q. Now, when you got over to Gillette what did you do? A. I went in the—when we got to Gillette I let the picket out and parked my car and the picket went on the equipment, picketing the equipment. I went up on the dock.

Q. You went up on the dock to look for the union
185 steward, I suppose? A. Yes, sir.

Q. What did you want to tell the union steward? A. I was going to tell him I had a picket on that American Iron truck. I was intending to do that.

Q. You wanted to tell him that you had a picket on a hot load? A. I don't know what particular language I used there. I was going to tell him on the American Iron truck.

Q. Did you find the steward? A. No, I think all I found was the foreman.

Q. The foreman? A. Yes. I think that's the foreman that I talked to.

Q. Did you find any dock employees around there? A. I didn't see any.

Q. You didn't see any? A. I don't recall seeing any dock employees. The foreman was sitting down over in a trailer there, sitting down, seemed like to me had his feet cocked up and leaning back in the deal.

Q. How did you know he was a foreman? A. He wasn't working; I'll put it that way.

Q. And you didn't see any dock employees? A. No, I don't recall seeing any dock employees, no.

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193 Q. Didn't you go over to D. C. Hall on this occasion? A. Yes, sir, I believe we did. In fact, we did.

Q. Did you talk to anyone when you got over to D. C. Hall? A. I don't recall any conversations except I may have had with Chapman.

Q. You didn't talk to anyone at all at Hall? A. I don't recall any conversation, no, sir.

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194 Q. Did anyone else say anything to you at Hall? A. I don't believe they did; not that I recall.

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204 Mr. Pickering: Well, we can try that route and I withdraw the offer of the amendment of the complaint at this time as stated to the reporter and amend my bill of particulars in this respect. Under I, bill of particulars, and under Subparagraph a thereof, add at the end of said paragraph a, "On or about September 22 at the Oklahoma City terminal of Hall."

Trial Examiner: Are there any objections to that amendment?

Mr. Poulton: I certainly have an objection, sir. There is no showing by General Counsel that there is a surprise. He had an opportunity to answer my motion for a bill of particulars; he did not include it. I think it is untimely at this time. I think it should be, my motion should be sustained to the amendment.

Trial Examiner: Well, I'll grant it, but only on the basis that this is the last such amendment I will allow either to the complaint or to the bill of particulars unless there's some showing of surprise and also again if the Machinists feel that it needs some time for additional preparation,

I'll be glad to consider that request at the close of the General Counsel's case.

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205 Mr. Poulton: Mr. Feiler, I would like the record to show that I except.

Trial Examiner: Yes.

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208 Mr. Grayson: If the Trial Examiner please, let me make this statement; the Teamsters admit that we didn't handle the freight. We admit that we told our employees not to handle the freight by virtue of our contract. Nothing that Mr. Foster might have said to Mr. Mitchell would have affected whether we handled the freight or not in one iota. We didn't handle it. We had a contract not to handle it. That's our admission in
209 this hearing here.

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214 Q. Now, you did have pickets at three different places that American Iron does business here in Oklahoma City, did you not? A. Well, we had pickets at the pipe yard and pickets at the main plant. We had two, four, six, ten—about ten pickets, I think, at times. Other times it was cut down thinner. Sometimes we only had six pickets on and some other times as many as ten, eight to ten.

Q. The pipe yard is located in what part of Oklahoma City? A. I think that's about Eighth and High, Southwest Eighth and South High.

Q. Southwest? A. Southeast, I am sorry, Southeast Eighth.

Q. And that's in the southeast part of Oklahoma City, is it? A. I don't know whether it's in Oklahoma City or not, whether it's in the city limits or not.

Q. All right. Now— A. It's within the Oklahoma City area.

Q. Where are the other two premises located, what part of Oklahoma City? A. Well, 518 North Indiana, then we have a warehouse, some warehouse facilities across the street.

Q. Where is 518, what part of Oklahoma City is
215 518 North Indiana? A. I'd say West Central.

Q. That's where this other location is right nearby, is that right, the other location of American Iron is right close to the 518 North Indiana? A. Well, yes, the other one across the street, the warehouse facilities, yes, sir, it's comparatively close, across the street.

Q. Now, this North Indiana, as I understand it, is a through street and traveled by quite a large number of cars? A. Oh, I don't know. I never—the thing is choked up quite a bit. I wouldn't testify as to the amount of traffic on it. It's choked up quite a bit by trucking activity over at the warehouse, this Griffith Warehouse. How much traffic it has on it I just couldn't say. Sometimes you have to wait on the trains there and on those trucks who are going in and out, and there is quite a bit of truck traffic, I guess, around in that area. It's kind of an industrial area.

Q. And it's also residential area? A. Yes.

Q. It is intermingled, isn't that right? A. That's right.

Q. And a large number of people pass there every day, wouldn't you say? A. Oh, I wouldn't say a large number.

There are some people pass there, I presume, every
216 day, most every day at least.

Q. Now, did you maintain the pickets at all three of these premises during the entire period of your strike from September 15 to October 21?

Mr. Poulton: I am going to object to that. I believe we have already stipulated to that fact.

Trial Examiner: Shall we save time and so stipulate?

Mr. Poulton: Yes, we so stipulate to that, sure.

Trial Examiner: That you had pickets at all the three locations during the whole strike?

Mr. Poulton: Yes.

By Mr. Pickering:

Q. Did you have pickets there at all times, at all three places? A. No, sir.

Q. On what occasions didn't you have pickets at all three places? A. Oh, night, during the night, why, we didn't have pickets on some of the stuff across the street from the 518 location.

Q. Did anyone keep you from having pickets there? A. Not that I know of.

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218 Mr. Pickering: We were discussing a stipulation. At this time I propose a stipulation between Respondent Machinists and General Counsel that the Respondent Machinists had free and unobstructed access to picket the three premises of American Iron in Oklahoma City during the entire period of time that American Iron was on strike.

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219 By Mr. Pickering:

Q. Now, Mr. Foster, did you go to the premises of Lee Way with a picket during the time that American Iron was on strike? A. Yes, sir.

Q. When did you go to Lee Way? A. Oh, I don't remember the dates I was there.

Q. With relation to when the American strike started on September 15 how long after the beginning of the strike? A. In relation to American Iron?

Q. The strike that began on September 15. A. And taking the picket out there in relation to American
220 Iron?

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221 Q. But you don't recall talking to any dock employee at Lee Way? A. No, sir, not in relation to American Iron, not during the term of that dispute.

Q. Not during the time that the strike was on at American Iron? A. Not that I recall in any manner. I don't remember any discussion, any conversation whatsoever with him. As far as I know I wasn't on the dock at all during this dispute.

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Q. Well, on the first occasion that you took a picket to Lee Way would you start in and tell us what happened from the time you got there until you left. A. I was out there several times and I don't remember on the instance of the first time exactly the movements that I made, but on all occasions, why, I drove in, let the picket out and picked him up at a time, I think probably on one occasion, I don't recall which time it was, why, I got out of
222 the car, went over near the area where they were being picketed.

Q. Did you ever at any time go up on the dock at Lee Way? A. I have been on the dock at Lee Way several times.

Q. Well, during the period of time that American Iron was on strike from September 15 to October 21 of this year? A. I don't recall any being on the dock at all during that time.

Q. Did you make any effort to locate the union steward, dock steward, at Lee Way on any occasion? A. No, sir, not on the occasion of this.

Q. Of this strike? A. Of this strike, no, sir.

Q. Did you tell anyone at Lee Way that you were only picketing the truck of American Iron? A. I don't—I would say no, I don't recall talking to any employees of Lee Way outside of probably our own people out there. I may have told them that we were picketing just the truck and not the——

Q. You didn't tell anyone around the dock— A. I didn't want our boys walking off from Lee Way around there which they would have done if we had put a picket on Lee Way.

Q. You didn't tell anyone who worked around the dock or on the dock that you were only picketing American Iron truck, did you? A: I don't recall telling anyone
223 that, no, sir.

Q. Did you make any effort to tell anyone that? A. No, sir.

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225 Q. Now, when you talked with Mr. Smith was there anyone close to you, sir? A. Yes, sir, there was, yes, sir.

Q. How close were they, sir? A. There was a couple of fellows right behind Mr. Smith, kind of in a row.

Q. About how far in feet, if you can approximate it? A. I would estimate that they were kind of lined up a couple of foot apart there, something like that.

Q. How far? A. A couple of foot apart, a couple
226 of foot in between them and kind of lined up.

Q. How far were they from you and Mr. Smith? A. Well, the first one was about a couple of foot behind Mr. Smith and the next one was a little bit behind him and a little bit off to the side kind of like.

Q. Could you give me a description of these people, sir? A. Oh, not a good description, not necessarily a good description. I didn't pay much attention to them. The fellow immediately behind Mr. Smith had on, seemed like, dark trousers, dress trousers, was rather heavy, I would say over 200 pounds, in the neighborhood of five foot eight, nine.

Q. And the other gentleman, sir? A. I couldn't even describe him to any extent

Q. Do you remember, Mr. Foster,— A. They looked like all three management.

Q. I believe that you stated numerous times—I don't want to burden the record with this statement—but would you again please tell me the purpose of your picketing of the American Iron truck at the common carriers' premises, please. A. To advertise that we were on strike, to make

known, to advertise that these people were doing our work, these people driving the truck and all were doing our work as such at that time.

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228 **William R. Hall,**

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified
229 as follows:

Direct examination.

By Mr. Pickering:

Q. Will you state your name and address for the record, please. A. William R. Hall, 4508 Libby, Warr Acres, Oklahoma.

Q. And you are employed at Lee Way, is that right? A. That's correct.

Q. And do you hold some position with the union in connection with your employment at Lee Way? A. I am a steward with Lee Way.

Q. Is that the dock steward? A. That's correct.

Trial Examiner: Teamsters Union, is that?

The Witness: Yes, sir.

By Mr. Pickering:

Q. You are dock steward for Local 886? A. Correct.

Q. The Respondent Teamsters in this case? A. That's correct.

Q. Now, have you had occasion to see pickets on the premises of Lee Way during the period of time from September 15 to October 21 of this year? A. Yes, sir.

Q. Did you ever have any conversation with any of the pickets or anyone accompanying the pickets? A. I did, yes.

230 Q. About when was that, please? A. I'd say around 6:30, 7:00 in the evening, pickup time.

Q. About what day of the month? A. Let's see, it would

be around September, right at the last of September; I couldn't recall the exact date.

Q. All right, do you know the man's name that you talked with? A. No, I don't recall it.

Q. Could you describe the man? A. Yes, I could.

Q. Would you, please. A. The man was about, he's about five feet seven, weighs about a hundred and eighty pounds, rather dark—well, medium complexion, 34 years old.

Mr. Poulton: Pardon me, is that 34?

The Witness: That's just my guess, I mean. The man, I am trying to recall, he was here present before. I identified him before in the previous hearing.

Mr. Pickering: May it be stipulated the man he described in the hearing room in the previous hearing was Bob Pickett, Page 46 of the transcript?

The Witness: Yes, that's correct, that was his name.

Mr. Poulton: I can stipulate that the man he identified at the injunction hearing here in the District Court on October 16 was a man by the name of Bob Pickett.

Trial Examiner: All right.

231 By Mr. Pickering:

Q. All right, what conversation did you have with Mr. Pickett? A. I noticed that the pickets, there were two of them, they were walking around as described before the "U" shape, the pickup truck. I didn't know what it was about and I was rather busy and this fellow came upon the dock and was wanting the steward and I seen him talking to some of the boys there on the dock and they pointed myself out to him and during this time the American Iron had unloaded their freight and set it on the dock. The man came and asked who in the hell was it that signed for those, that freight. I told him that I was sure it wasn't any of the union fellows, that it probably was the Lee Way personnel. He asked me if I recognized a strike. I told him I didn't know, that I wanted to find out about it, it

was all a shock and news to me just to see a picket pop out of the blue.

Then I asked him if he could picket on Lee Way property, that I thought that the picket had to be at the gates of the property and whether he was trespassing private property or not. He asked me if we were—if he was going to handle freight, and I told him as far as I knew once that freight was placed on the dock that we did have to handle it, and that no one advised me though, I mean as far as the strike or anything, what to do about it and I would try to find out and we would work in accordance to whatever was right.

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234 Mr. Grayson: If the reporter would, please, mark this as Respondent Teamsters' Exhibit 1.

(Thereupon the document above referred to was marked Respondent Teamsters' Exhibit No. 1; for identification.)

235 Cross-examination.

By Mr. Grayson:

Q. I have a copy of it here also. Mr. Hall, I will hand you what has been marked here as Respondent Teamsters' Exhibit No. 1 and ask you as dock steward for Lee Way and a member of Teamsters Union if you can identify that pamphlet or book that you have in your hand, whatever you want to call it. A. I can, yes.

Q. What is that, Mr. Hall? A. This is our agreement between Local 886 with the Lee Way Freight Lines.

Mr. Grayson: All right, sir, we offer this in evidence at this time.

Trial Examiner: Is there any objection?

Mr. Pickering: Yes, Mr. Examiner, I object to going into a matter of any contract that Teamsters might have with Lee Way. It's improper on cross-examination. If the respondent wants to raise some contract as defense in this matter he will have an opportunity to do so when he

presents his case, but it is improper to do that on cross-examination of my witness.

Trial Examiner: Well, the defensive contract has already been raised in the Teamsters' answer, and I agree with you that the objection to introducing the matter at this time can be raised, it's just a question of if you want to let it in more or less as time saving. If you want to press your objection, the man will have to come back when the Teamster puts on his case. If you want to press your objection I will sustain it.

236 Mr. Grayson: My only point in introducing this is I just want to ask him one question about it. Otherwise I am going to have to bring him back at a later date and I am just trying to save time.

Mr. Pickering: I will not object to introduction of the document; in fact, I would stipulate with the Respondent Teamsters that they have such a contract. However, I do not want to go into matters of his defense on cross-examination of my witness.

Trial Examiner: Well, if we stipulate to that now, are you willing to stipulate to that now?

Mr. Pickering: I will on condition that there's no questions to be allowed upon the basis of this contract at this time.

Mr. Grayson: The only questions which I will ask about this contract will be proper cross-examination, in other words, there are certain allegations that have been made against the Teamsters and——

Trial Examiner: Well, I think that the act actually has gone into handling practices sufficiently, perhaps warranting some of this matter coming in now, it isn't prejudicial either way, and I will at least let the contract come in now. Is there any objection to this Exhibit 1?

Mr. Poulton: Respondent Machinists have no objection.

Mr. Pickering: I have no objection to it.

Trial Examiner: All right, there being none, it is
237 received in evidence.

(The document heretofore marked Respondent Teamsters' Exhibit No. 1 for identification was received in evidence.)

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239 By Mr. Poulton:

Q. Is this the way I understand your testimony, if I am not stating it correct please correct me, that on September 18, approximately September 18, you talked with Mr. Bob Pickett on the dock at Lee Way? A. Correct.

Q. And exactly what did you say to Mr. Pickett and exactly what did Mr. Pickett say to you? A. Mr. Pickett wanted to know who in the hell had signed for the freight, the truck had left, had pulled out, but Mr. Pickett was trying to find out who had signed for this freight. He had talked to a couple of boys in the hold next to me, one of them says no, there's the steward there, talk to
240 him, so he asked me who had signed for the freight. —I told him I didn't know, that I am sure it was not a union man. He says, "Do you recognize our picket?" I told him I thought so but I didn't know for sure because I was surprised there was a picket even there. It was all news.

He asked me what were we going to do about it in the future, whether he was going to handle the freight or what we was going to do. I told him I would try to find out and we would do what was right and in accordance.

Q. Did he ever ask you not to handle the freight? A. He said we shouldn't. He didn't tell me not to. He said we shouldn't.

Q. What words did he use when he told you that? A. He said we shouldn't and then there was a story related about some truck driver who had taken some freight and had

got up to some little town and discovered the American Iron on it and turned around and came back.

242 Q. I will withdraw that and reword it. The picket walking around the American Iron truck had no effect on the unloading of the other truck, did it? A. Except for the turmoil, wanting to know what was coming off.

Q. But they still continued to unload the other trucks, isn't that right? A. Yes.

245 **Thomas D. Armstrong,**

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Pickering:

Q. Would you give your full name and address for the record, please. A. Thomas D. Armstrong, 3240 North-West Eleventh, Oklahoma City.

Q. You are the dock foreman here at T. I. M. E. in Oklahoma City, isn't that right? A. Yes.

Q. Did you have an occasion on or about the last of this year to talk to the T. I. M. E. dock steward, Roy McGilliard? A. Yes.

Q. Would you tell us, please, what this conversation was that you had with Roy McGilliard, what you said and what he said. A. Well, it came about due to the fact the night, the previous night we were going to load out some American Iron freight that had been brought to the dock, and the assistant dock foreman and I had been loading the freight out ourselves rather than ask the union employees to handle it, and the previous night before we talked to the steward, the assistant dock foreman had intended to load out the freight on the road trailer and the boss told him that due to the union contract he was not allowed to handle

246 freight, so he in turn called Mr. Chamblin, terminal manager down there, and he told him, told the assistant dock foreman to specify one man to load the freight and if he refused to call him. So he picked out one man and asked him to load the freight. Of course, he refused saying the steward told him he would be fined $65 if he handled the freight. So the next day we called the union steward, Roy McGilliard in to talk to him about the situation and he said that Mr. Mitchell had told him that none of the union employees should handle freight, and so we asked him to try to find out definitely whether we were not supposed to handle it at all, whether either I or the assistant dock foreman could load it or whether we just didn't handle it period, so he said he would try to find out, so the next morning he came in and told me that he had called Mr. Mitchell and that he didn't get any definite answer and told him to work it out as best we could and not cause any more confusion than was necessary.

So either myself or the assistant dock foreman continued loading out American Iron freight.

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248 Cross-examination.

By Mr. Grayson:

Q. Mr. Armstrong, if I understand you correctly, I believe you—Was it you or the assistant foreman that called the terminal manager and he told you to designate one man to handle this freight; was it you or the assistant? A. That was the assistant.

249 Q. Assistant foreman? A. Yes, sir.

Q. And the assistant foreman did that, is that right? A. Yes.

Q. Do you recall the name of this employee who was designated to handle the freight? A. Yes.

Q. What was his name? A. Bobby Brown.

Q. Bobby Brown? A. Yes.

Q. And I believe you testified that Bobby Brown refused to handle the freight after he was designated to do so? A. That's right.

Q. Now, I did not understand clearly, Mr. Armstrong, what you said that Bobby Brown stated his reasons for not handling it. Would you repeat that, please. A. He said that the union steward told him that he would be fined $65 by the union if he handled the unfair freight, and he says, "I can't afford a $65 fine."

252 Trial Examiner: We have had testimony as regards this Teamsters' contract that so far Lee Way and T. I. M. E. were parties to it. How about the other three carriers mentioned here, were they covered by it?

Mr. Grayson: Sir?

Trial Examiner: We have had testimony that Lee Way and T. I. M. E. were parties to this contract. How about the other three carriers, were they bound by it?

Mr. Grayson: I think we can stipulate that all of these carriers mentioned here have a contract with Local
253 Teamsters 886 just like this.

Trial Examiner: Is that agreed to?

Mr. Pickering: General Counsel will stipulate that the five carriers mentioned in the Teamsters' complaint each have a contract with the Respondent Teamsters, which contract is the same as the exhibit, Respondent Teamsters' Exhibit 1.

Trial Examiner: All right.

Mr. Poulton: That's all right.

Leon Berrong,

a witness called by and on behalf of the General Counsel, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Pickering:

Q. Would you give your full name and address to the reporter, please. A. Leon Barrong, B-a-r-r-o-n-g, 2768 Northwest Eighteenth, Oklahoma City.

Q. Now, you are the district manager for Gillette Motor Transport in Ofllahoma City, is that cor-
254 rect? A. That's right.

Q. There has been testimony here that there was on occasions picketing by Respondent Machinists at the premises of Gillette here in Oklahoma City. Now, would you state whether or not your employees have handled the freight of American Iron during the period of time from September 15 to October 21 of this year? A. I can state personally that they handled it one night. The rest of the time I wasn't there.

Q. They handled it one night, you say? A. Yes.

Q. Was there any time that they refused to handle American Iron freight? A. All I can say is what was told to me by my dock foreman.

Q. When was that? A. When was that?

Q. Yes. A. I don't recall the date. There was one night that they didn't want to handle the freight.

Q. Did you have a conversation with the dock steward concerning that incident? A. No, not that incident.

Q. Did you have a conversation with Mr. Mitchell concerning that incident? A. Yes, I did.

255 Q. That is Mr. Ralph Mitchell who is the business agent of the Teamsters Union? A. Yes, sir.

Q. Now, could you state whether or not that was about the 5th or 6th of October of this year when that conversation occurred? A. It was around that time. Now, I might correct that there that I had a discussion with the dock foreman, my dock foreman—steward, I mean, at the same time I had a discussion with Mr. Mitchell, together, jointly.

Q. Was anyone else present other than the dock steward, Mr. Mitchell and yourself? A. No, sir.

Q. What is your dock steward's name, please? A. Robert Hawkins.

Q. Where did this conversation take place? A. In my office.

Q. At Gillette? A. Yes.

Q. Would you tell us, please, what all was said during the course of this conversation? A. Well, I called Mr. Mitchell over to my office and wanted to get the question cleared up whether or not it was, the freight was fair or unfair, or whether the boys should handle it or not. He would not declare the freight, the American Iron freight, fair or he would not declare it unfair.

256 Q. First, where was Mr. Mitchell? You state you called him over to your office. A. He was over at the Makin Transportation. I was over there and called him over.

Q. Across the street from your place of business? A. Right.

Q. All right. Go on and tell us as well as you can remember what you said and what Mr. Mitchell said and what Mr. Hawkins said. A. Well, I tried to get some statement out of Mr. Mitchell as to whether or not it was fair or unfair freight. He would not declare it fair or he would not declare it unfair. He would not tell the boys not to handle it or he would not tell them to handle it. He just referred us to Article 4 of the contract.

Q. What were your words to Mr. Mitchell; what was your question to Mr. Mitchell, the best you remember your words? A. Well, the question was after the freight was placed on our dock whether it was still unfair freight.

Q. What did Mr. Mitchell say, what were his words? A. He would say nothing only refer me to Article 4 of the contract.

Q. Now, as I understand your testimony, Mr. Berrong, you asked Mr. Mitchell whether or not American Iron freight was unfair when it was brought to your dock, is that right? A. That's right.

Q. And you state that he would not tell you whether it was fair or unfair but would just tell you to see
257 Article 4 of your contract, is that correct? A. That's right.

Q. Did Mr. Mitchell or any other representative of the Teamsters Union ever tell you or to your knowledge any other member of management at Gillette whether or not the freight from American Iron was unfair? A. No, sir, not to my knowledge.

Q. What was the past practice with respect to informing you or not informing you as to what freight is considered unfair by the Teamsters Union? A. Well, in the past it's been some time back, I could not say for sure whether it was on business firms or whether it was on other freight lines, they would call us and tell us they were having labor trouble, but I do know they did on the other freight lines.

Q. Were you ever notified by the Teamsters Union, either orally, by telephone, in person or in any written manner, whether or not American Iron freight was unfair? A. No, sir.

Q. Were you ever notified by the Teamsters Union that American Iron had a strike? A. No, sir.

Q. Was there any occasion after this conversation with Mr. Mitchell when the employees of Gillette refused
258 to handle freight from American Iron? A. Once, I talked with him on the telephone. That was all.

Q. You talked with who, Mr. Mitchell? A. Mr. Mitchell, yes.

Q. I don't believe you understood my question, Mr. Berrong. The question was did the employees at Gillette refuse to handle American Iron freight on any occasion after this conversation you had with Mr. Mitchell? A. Well, not to me, they may have to my dock foreman. He would have to answer that.

Q. Well, to the best of your knowledge was there any refusal to handle freight on the part of your employees after this conversation? A. Yes, according to my dock foreman they did.

Q. What did your dock foreman refer to you? A. He reported they would not sign for the freight or they would not load it after it was placed on the dock by the American Iron employees.

Q. Did you ever have occasion yourself to instruct your employees to handle American Iron freight? A. One time.

Q. When was that, sir? A. I can't give you——

Q. With relation to this conversation you had with Mitchell. A. I don't recall whether it was prior to
259 the conversation or after the conversation.

Q. How long was it, relatively close either before or after that conversation? A. Yes, sir, in there about the same time.

Q. Would you describe that occasion to us, please, what you said, what happened. A. Well, the American Iron pickup truck came up to the dock and I asked each one of the employees individually if they wanted to sign for the freight, and each one of them refused and then the dock foreman signed for it, so then I started down the same routine to see who wanted to load it, and one of the boys went to a telephone and called someone and came back and said, "Yes, we'll load it." They went ahead and loaded it.

Q. What was it you told the employees? A. What I told them?

Q. Yes, what were your words to these employees? A. I asked them if they wanted to sign for it, then I asked them if they wanted to load it.

Trial Examiner: Unload it?

The Witness: Load it, load it after it was already on the dock.

By Mr. Pickering:

Q. And then they told you or they refused to, is that right? A. No, no.

Q. What was it? A. They refused to sign for it,
260 after American Iron had placed it on the dock they refused to sign for it, then I started down the line

asking them who wanted to load it on our trailer leaving town, and then one of the boys went to the telephone, used it, came back and said, "Yes, we'll load it."

Q. What did they tell you, though, when you asked them, "Does anyone want to load this freight?" Did they tell you anything when you asked them that? A. No, no, they just said just a minute.

Q. Did the employee tell you who he was calling or who he did call? A. No, he didn't.

Q. Now, did you make any statement on that occasion as to whether or not Gillette was going to move the American Iron freight? A. Did I make any statement at that time?

Q. Yes, sir. A. I don't recall exactly, unless I made the statement after it was placed on our dock. I did not think it was unfair freight and according to the Interstate Commerce Commission we had to handle the freight.

Q. Well, did you tell the employees that? A. Yes, sir, yes, I told them that.

Q. And after this phone call was made by this employee did you state whether or not the employees handled
261 the freight? A. Yes, they did.

Q. Did they continue to handle American Iron freight after that occasion, to the best of your knowledge? A. No, I think they refused it later on.

Q. Do you recall approximately when that was? A. Oh, I believe it was the next day or the following day after the first hearing.

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Cross-examination.

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264 By Mr. Grayson:

Q. You testified, I believe, that Mr. Mitchell would not tell you whether or not these were unfair goods, is that right? A. That's right.

Q. Is there any provision in the contract as to who is to determine whether or not goods are unfair in an occasion

like this? A. Well, he would not determine the company was fair or unfair either.

Q. I know, but was it any more his obligation than it was yours to make such a determination? Both of you were parties to the contract, would one of you be more obligated to make a statement as to whether they were or not? A. What I wanted to determine was what was unfair merchandise coming from a company.

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274 Mr. Pickering: At this time, Mr. Examiner, I have two or three stipulations I would like to propose. It is stipulated by and between counsel for Machinists and General Counsel that the Teamsters Union, the respondent in this case, represents the dock employees at the five carriers named in the complaint in both cases.

Do you stipulate to that?

Mr. Poulton: We will so stipulate.

Mr. Pickering: I now propose a stipulation by and between counsel for the Teamsters Union and counsel for the General Counsel that two Santa Fe drivers who refused to haul American Iron freight are members of Wichita, Kansas, local and are not members of the Respondent Teamsters local and that these two Santa Fe drivers, Nebergall and Greenstreet, are covered by a contract to which the Oklahoma City Local is not a party but rather is a contract between the Wichita Local and the Santa Fe Company.

Trial Examiner: Is that so stipulated?

Mr. Grayson: Off the record.

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Mr. Pickering: It is also agreed and understood
275 by and between counsel for the Teamsters and counsel for the General Counsel that the contract re-

ferred to as being a contract between the Wichita Teamsters Local and Santa Fe is the contract commonly known as Central States Area Agreement.

It is further stipulated that the contract between Santa Fe and the Wichita Teamsters Local has a clause known as Article 9, which reads as follows:

"It shall not be a violation of this contract and it shall not be cause for discharge if any employee or employees refuse to go through the picket line of a union or refuse to handle unfair goods, nor shall the exercise of any rights permitted by law be a violation of this contract.

"Then term 'unfair goods' as used in this article includes but is not limited to any goods or equipment transported, interchanged, handled or used by any carrier, whether party to this agreement or not, at whose terminal or terminals or place or places of business there is a controversy between such carrier or its employees, on the one hand, and a labor union on the other hand, and such goods or equipment shall continue to be 'unfair' while being transported, handled or used by interchanging or succeeding carriers, whether party to this agreement or not, until such controversy is settled.

"The union agrees that in the event the employer becomes involved in a controversy with any other union the union will do all in its power to help effect a fair settlement. It is understood that in the event the decision of the National Labor Relations Board in the
276 Company Case is sustained or prevails on appeal to the higher Federal Courts this article will be renegotiated and rewritten to provide the union with a maximum of protection afforded by such decision."

Mr. Poulton: Off the record.

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Mr. Grayson: I will stipulate to it.

Mr. Poulton: The Machinists will not stipulate to it, sir.

Trial Examiner: Well, all right.

Mr. Pickering: Can you stipulate to any part of it?

Mr. Poulton: No.

Trial Examiner: I think as far as the prior stipulation about the Teamsters representing the dock employees with the five carriers the Teamsters will enter into that stipulation, too, is that right, as regards the prior stipulation that the Teamsters represented the dock employees at the five carriers, Teamsters would enter into that stipulation, too, I take it?

Mr. Grayson: That we represented the dock employees at the five carriers, yes, sir.

Trial Examiner: Now, on the stipulation we have got agreement between the General Counsel and the Teamsters, and the Machinists show some sort of dissent or at
277 least not entering into it, is that right?

Mr. Poulton: That's correct.

Trial Examiner: Where does this stipulation enter into the case, then, if you want to tell me that now, and is there some problem that we have to face now in view of that?

Mr. Pickering: Not at this point. However, inasmuch as the Machinists raise an objection to the stipulation, it may be necessary to have some testimony and introduce the contract itself.

Mr. Poulton: I think you are going to have to, sir.

Trial Examiner: I think you'd stipulate that the Central States Agreement, to which the Machinists is not a party, Mr. Poulton, at least has the clause in it that was read?

Mr. Poulton: Yes, sir, I will stipulate to that.

Trial Examiner: So you don't have to have proof of the contracts.

Mr. Poulton: No, I will stipulate it as the clause.

Trial Examiner: It's just the other matters that you have some questions on?

Mr. Poulton: That's right.

Trial Examiner: Where does this enter into the case, Mr. Pickering?

Mr. Pickering: There will be testimony later on that.

Trial Examiner: All right, we'll have to take it from there, then.

Mr. Poulton: May we go off the record a minute?

278 Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Mr. Poulton: After due consideration and brow beating by the General Counsel the Machinists will stipulate to the prior stipulation.

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294 **William B. Jones.**

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Mr. Pickering: Mr. Examiner, before we get into the examination of this witness I have one further stipulation.

It is stipulated by and between counsel for the Respondent Teamsters and counsel for the General Counsel that on or about October 11 or 12 the dock stewards and dock employees of the five carriers named in the complaint were told by the Respondent Teamsters Union to handle American Iron freight brought to the respective docks if the Machinists' pickets were not present with the American Iron truck and picketing around the American Iron truck,

and that after such instructions the dock employees

295 at the five respective carriers did handle American Iron freight until after October 16 of this year.

Mr. Grayson: I'll stipulate to that.

Mr. Poulton: May we go off the record just a moment?

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Mr. Poulton: I will stipulate to that.

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300 Trial Examiner: I think you people, as I understand it off the record, arrived at some stipulation. I think you are in agreement that this was a non-union freight-handler or freight carrier, this Rose Company, and I think further you people are ready to stipulate that the Machinists did not do any picketing on those premises, is that right?

Mr. Poulton: That's right.

Trial Examiner: Whether or not the company made delivery is up to them to specify.

Mr. Poulton: I assume that the American Iron trucks went to J. H. Rose. I assume that. I will stipulate to that. May I ask, General Counsel has not said he would stipulate to those facts or he wouldn't stipulate to them.

Mr. Pickering: I'll stipulate to that.

Trial Examiner: All right, there are three things in the stipulation, first, that it was a non-union carrier, J. H. Rose; second, that the Machinists did not picket at J. H. Rose; and third, that the company did make some deliveries there, is that right, gentlemen?

Mr. Poulton: That's correct.

Mr. Pickering: It is understood and stipulated by counsel for General Counsel.

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313 **Bobbie L. Wilkerson.**

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Pickering:

Q. Would you give your full name and address to the reporter, please. A. Bobbie L. Wilkerson, 10 Northwest Thirty-first.

Q. Where are you employed, Mr. Wilkerson? A.

314 D. C. Hall Transportation Company.

Q. In what capacity are you employed? A. Checker foreman.

Q. Are you also the dock steward for Teamsters' Local 886? A. Yes, sir.

Q. Do you have any authority to hire and fire people? A. No, sir.

Mr. Pickering: May it be stipulated that Mr. Wilkerson is not a supervisor within the meaning of the Act?

Mr. Grayson: Yes, sir.

Mr. Poulton: I'll stipulate.

By Mr. Pickering:

Q. Mr. Wilkerson, I direct your attention to a period of time about the middle of September of this year and ask you if there was an occasion—when was the first occasion around that time that American Iron truck came to D. C. Hall's dock and was picketed and a picket picketed around the truck? A. I wasn't present at the first occasion.

Q. When was the first occasion when you were present? A. I am not exactly sure of the date; I think it's in the statement.

Q. Approximately when? A. It would be around the 16th, 15th of September, I imagine. I am not sure.

Q. All right, would you tell us what happened on
315 that occasion, please? A. The American Iron driver backed up to the dock and started setting the freight off the dock. I walked up to the back of the truck and the Machinists' picket with the sign on, the banner, was walking around the truck in a "U" shape from the dock to the front of the truck and around. I looked at the picket and I looked at the sign that was on it, paid special attention to the two words "on strike" and I told the driver, I says, "We can't accept your freight," I says, "we can accept it but it won't go out," and the driver turned around and said something to the boy on the truck with him and went in the office and used the telephone.

He said, maybe ten minutes he come back and put the freight back on the pickup, said, "We'll take it to J. H. Rose and we'll straighten out this mess."

Q. All right, sir, how long after or were you told of an occasion before this when a picket came— A. Yes, sir.

Q. —to D. C. Hall premises. Approximately how long from the first occasion that a picket came to the D. C. Hall premises was this when you observed the picket at the Hall premises? A. To the best of my knowledge that first occasion was on Friday, and I believe this occasion where I was present took place on Monday or Tuesday.

Q. Of the next week? A. Yes, sir.

316 Q. Do you know whether or not the dock employees handled the freight on the preceding Friday? A. Yes, sir, they did.

Q. On the day that you have related that you saw a picket at the Hall premises when an American Iron truck was present, did you have an occasion on that day to have a conversation with Mr. Ralph Mitchell, the Teamsters' business agent? A. I did.

Q. Where was this conversation at that time, please? A. On the dock at D. C. Hall.

Q. Was anyone else present other than you and Mr. Mitchell? A. Not on the dock.

Q. Would you tell us, please, what was said between you and Mr. Mitchell?

Mr. Poulton: Before you go into that, Mr. Feiler, I would like to ask the General Counsel to establish the date that this took place.

Trial Examiner: The witness has testified this was on the date of that incident that he first witnesses the picketing. Isn't that right?

The Witness: Yes, sir.

Mr. Poulton: It was on a Friday.

Trial Examiner: No.

Mr. Pickering: It was the first time he witnessed the picket present.

317 The Witness: Mr. Mitchell came out on the dock and asked me if we had been handling freight for American Iron, and I told him they had on one occasion, and he presented a copy of the contract and showed it to me, pointing out Section (b) of Article 4, and he said, "It is a violation of our contract to handle the freight." So I told him that was fine, I would inform the dock employees of this violation and it wouldn't happen any more.

By Mr. Pickering:

Q. Well, did he say anything to you about the dock employees having handled the American Iron freight previous to this? A. No, sir, he asked me if they had handled it and I told him they had.

Q. Is that the time when you were told it was a violation of your contract? A. Yes, sir.

Q. All right, sir. Did he say anything to you about what could be done if you did handle it? A. He said that a person could lose his book, which is a phrase we used on the freight dock among the drivers and dock men that you are brought before the board and charge is filed against you, but I have inquired about that statement and it's been explained to me that you cannot lose your book because it's your own personal property, that if you are charged with a violation of the contract you are tried before the board and if you are found guilty they refuse to accept your dues, an unfit union member.

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319 Q. All right, sir. After you had the conversation with Mr. Mitchell did you make any statement relating to that conversation to the dock employees? A. I informed the dock employees that it was a violation of our contract to handle the freight and that they could lose their book if they did.

Q. Now, this book you are referring to is your union book, is that correct? A. Yes, sir.

Q. Do you remember the words you told them in
320 regard to they could lose their book? A. No, sir.

I think I told them that it being a violation of the contract they could be brought before the board and tried for the violation and consequently lose their book and consequently lose their job, but I am not exactly sure of the exact words.

Q. Did the management of D. C. Hall, any person of management, ever make any statement to you as to whether or not they desired to accept the American Iron freight? A. Yes, sir.

Q. Who made such a statement to you? A. Well, first, the solicitor, George Dowdy, and the assistant to the president, Dan Murrell, and present terminal manager, Claude Lowe.

Q. What was their desire with respect to handling or not handling the American Iron freight? A. Their desire was to handle the freight, the man told me that's what we are in business for, and I told him that——

Q. Who is that who told you that? A. Dan Murrell and Mr. Lowe both.

Q. All right. A. I told him that under the present condition that it being in violation of the contract that I couldn't do it, and it went on from there, various arguments about it. They told me, "Well, other lines are handling it," and I told them, "Well, I am not concerned with other freight lines, I am concerned with D. C. Hall and my job is checker foreman and dock steward for the union."

321 Q. Now, were you present in the hearing here held on October 16 before Judge Wallace— A. Yes, sir.

Q. —in this matter. All right. Could you tell us, please, whether or not you had any conversation with Mr. Mitchell after that hearing with relation to handling or not handling American Iron freight. A. Yes, sir, I did.

Q. What was that conversation, please? A. He informed me that the hot cargo clause in the contract had been upheld and that it was a violation of the contract and not to accept the freight.

Q. Did he tell you to handle the freight under any circumstances? A. Not after the hearing on the 16th.

Q. What did he tell you in that regard? A. Not to handle the freight.

Q. Under any circumstances? A. As long as American Iron was on strike.

Q. Did D. C. Hall's dock employees handle the freight after this occasion that you have related when you told the employees they could get their book—they could lose their book? A. No, sir.

Q. The date of that occasion of your conversation with Mr. Mitchell and the same day that you saw the picket come down with the American Iron truck, could that have
922 been on the 22nd of September, which was the Wednesday following the previous Friday? A. It could have been, sir; I am not sure of the date.

Q. Was it about that time, about the following Wednesday? A. It was either Tuesday or Wednesday.

Mr. Pickering: That's all.

Cross-examination.

By Mr. Grayson:

Q. Mr. Wilkerson, in Paragraph 22 of the complaint filed by the counsel for the General Counsel against the Respondent Teamsters it alleges that "since on or about September 16, 1954, Respondent Teamsters, by and through its agents, Ralph Mitchell and Bobbie L. Wilkerson, Hall dock steward, has by oral instructions, threats and appeals induced and encouraged Hall dock employees to refuse to receive, check or otherwise handle American Iron freight."

I'll ask you whether or not at any time since September 16, 1954, did you make any threats to any of the employes of the D. C. Hall Transportation Company to cause them not to handle the freight? A. No, sir, I did not threaten anybody. I merely informed them that according to our contract it was a violation of the contract to handle the

freight, and as business agent of the union Mr. Mitchell is the only person who interprets the contract for the dock stewards at the various truck lines.

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329 **Claude Lowe.**

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Pickering:

Q. Would you give your full name and address to the reporter, please. A. Claude Lowe, 1424 Northeast Nineteenth, Oklahoma City.

Q. What is your occupation, Mr. Loew? A. Terminal manager for D. C. Hall Transportation Company, Oklahome City.

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331 By Mr. Pickering:

Q. Did you ever have occasion to ask D. C. Hall employees to sign for American Iron freight? A. Yes, sir.

Q. How many employees did you ask to sign for American Iron freight? A. Two.

Q. Approximately when was that, please? A. I couldn't give you the date, sir. I couldn't even begin to give you the date. It was somewhere—it seems to me like the first time I asked them was the first time they brought a shipment to us while we was on strike, which I think was

332 on Friday.

Q. Were you ever notified in any manner by the Teamsters Union that American Iron and Machine Works Company was an unfair company? A. No, sir.

Q. Did the Teamsters Union ever notify you in any manner that the freight brought to D. C. Hall dock was goods or freight from an unfair company? A. No, sir.

Q. Now, on this occasion that you asked two employees to sign for American Iron freight, what did these employees tell you? A. Well, the first one that I asked to sign for the freight did sign for it and loaded it.

Q. On the first occasion? A. Yes, sir.

Q. Did you have an occasion after that? A. Yes, sir.

Q. When was that? A. A few days later, two or three days later, they brought some more freight to the dock and the employees set it off on the dock and wanted to know if it would go out tonight, and I told them no, it wouldn't go out because the boys had refused to sign the bills or even load the freight, and that was—the conversation was with Mr. Wilkerson, the checker foreman, and American Iron.

Trial Examiner: You mean Wilkerson told you
333 that, is that your testimony?

The Witness: No, I had asked Wilkerson to, on the other occasion, I had asked Wilkerson if he would sign the freight and handle it and he said no, we couldn't handle it. When American Iron brought this next freight to the dock, I informed them that it wouldn't go out.

By Mr. Pickering:

Q. Now, approximately how long after this first occasion that you have related where you asked some employee to sign for the freight and he did, was it when the American Iron freight was brought to the dock and this conversation was had where you told him or the American Iron driver that the freight wouldn't go out? A. I don't remember the dates. I'd say it was a few days, three or four or five days after the first.

Q. After the first occasion? A. Yes, sir.

Q. Could that have been about the 4th or 5th of October? A. Well, it could have been.

Q. Do you remember an occasion when I came to your office first, the first occasion when I came to your office to talk with you concerning this matter? A. Yes, sir.

Q. Do you remember whether or not that was before or

after the occasion that I first came to your office to talk with you? A. Your first trip to my office?

334 Q. Yes, sir. A. It was before.

Q. Approximately how many days before? A. I'd say maybe a week.

Q. Do you know what the position of D. C. Hall was as to whether or not they desired to handle the American Iron freight while American Iron employees were on strike? A. It was the desire of the company to handle the freight.

Q. Did you make that known to either Mr. Wilkerson, the dock steward or the dock employees? A. Yes, sir. It was my desire also and I asked the steward if he seen any way he could handle that freight and he said he could not.

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Cross-examination.

By Mr. Grayson:

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336 Q. Now, I understand, Mr. Lowe, that you asked your employees to handle the freight for American Iron, is that correct, sir? A. Yes, sir.

Q. And you personally asked them? A. Yes, sir, I did, the night checker.

Q. Did the employees refuse to handle the freight? A. No, sir.

Q. They didn't refuse to handle it? A. No, sir.

Q. You mean they handled the American Iron freight? A. Yes, sir, that was on the first occasion.

Q. On the first occasion? A. Yes, sir.

Q. Did you ask them on any other occasion to handle the American Iron freight? A. Yes, sir.

337 Q. Did they handle it then? A. No, sir.

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341 **Clifford M. Troxel,**

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Pickering:

Q. Give your full name and address to the reporter, please. A. Clifford M. Troxel, Route 11, Box 291F, Oklahoma City.

Q. And you are employed at Santa Fe Trail Transportation Company here in Oklahoma City, is that correct? A. Yes, sir.

Q. What is your capacity with that company? A. Pickup and delivery driver.

Q. Are you, in connection with your job at Santa Fe, also the dock steward for Teamsters Local 886? A. Yes, sir.

Q. Were you such a dock steward at Santa Fe during the months of September and October of this year? A. Yes, sir.

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343 By Mr. Pickering:

Q. Mr. Troxel, how did you first learn of the American Iron strike? A. By seeing the pickets in front of the place of business.

Q. In front of American Iron's place of business? A. Yes, sir.

Q. Did you ever, on any occasion that you saw pickets in front of American Iron's place of business, have any conversation with anyone there? A. Yes, I talked to one of the boys, oh, a couple of days after they went out on strike.

344 Q. Where did you have this conversation? A. Across the street from American Iron property on Indiana and Fifth Street.

Q. Did you know the name of the person that you talked with there? A. No, sir.

Q. Did this person identify himself in any way to you? A. Only a strike captain.

Q. As what? A. A picket captain or something.

Q. Could you describe this person for us, please? A. Well, let's see, he was, oh, about five feet ten inches tall, weighed around a hundred eighty pounds, black headed, I believe, with a cap.

Q. Could you describe this cap for us, please? A. I don't remember about the color of the cap. I do remember there was a Machinists button on it. That would be all.

Q. All right, was anyone else present at this conversation? A. No, sir.

Q. Would you tell us, please, what your conversation was that you had with this person who identified himself to you as a picket captain? A. Well, we exchanged usual greetings and then I asked him, told him that I had heard that Mr. Foster had been down at the dock looking for the steward and asked him if Mr. Foster was around
345 and he said no.

I asked him if he had any idea of what he might have wanted and he said he didn't. I turned to leave and he says, "Well, I hope you boys observe our picket and help us out." I believe he said not to handle their freight, and I told him I was afraid that would be a secondary boycott.

He told me he didn't think so, and I told him I would reserve opinion on that.

Then I went on about my regular business.

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346 By Mr. Poulton:

Q. I don't believe we have established the date that you talked to the man, alleged picket captain, at the American Iron premises. Do you remember what date that was, sir? A. I would say it was about the 17th of September, the start of the strike was on the 15th, I believe it would be about the 17th.

Q. The strike was started on the 15th, that's correct, and you say it was about 17th? A. Yes, sir.

Q. About what time of day was that, sir? A. About around 3:00 o'clock in the afternoon.

Q. Just where was this man standing when you talked to him? A. We were on the southwest corner of the intersection, if that street had been open through east, across northwest of the main entrance of the American Iron building.

Q. Did this gentleman have a picket sign on? A. No, sir.

Q. Had you ever seen him before, sir? A. No, sir, I hadn't.

Q. Do you know whether or not he was an employee of American Iron? A. I couldn't swear that he was, no.

Q. Do you know whether he was a member of Local 850, sir? A. I seem to remember that he had a Machin-
347 ists button on his cap.

Q. Was it a button, sir? A. Yes.

Q. What do you mean by a button? A. Oh, a round union dues button or emblem.

Q. Does that mean to you, sir, that he was a member of Local 850? A. Well, that alone wouldn't, no.

Q. It wouldn't? A. No.

Q. Then it is your testimony that your are not sure that he was a member of Local 850, is that correct? A. Well, I couldn't swear definitely he was a member, no.

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349 Redirect examination.

By Mr. Pickering:

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Q. Now one other question to help establish the date of this. It is my understanding from stipulation on
350 the part of—answer, rather by the Respondent Teamsters in this case that you gave some instructions to employees of Santa Fe not to handle American Iron freight. Now, that is right, isn't it? A. I told the boys that it would be unwise as long as that paragraph, I mean Article 4——

Mr. Grayson: We have stipulated to that. We have admitted it.

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352 Further redirect examination.

357 Q. Directing your attention to that occasion about the 20th of October of this year, did you have an occasion to be present with Mr. Hancock, an American Iron driver, and Mr. Adams, who works at Santa Fe? A. Mr. Adams was the only one I recall. I don't know who Mr. Hancock is..

Q. Was another person present? A. In the office, you mean?

Q. Yes, sir. A. There were several men in there. I don't know.

Trial Examiner: Was this date October 20, Counsel?

Mr. Pickering: Yes, sir.

By Mr. Pickering:

Q. Now, was there an American Iron, someone there with an American Iron truck? A. Yes, about 5:30 in the afternoon I should say, something like that.

Q. Was the driver of this American Iron truck present? A. Yes.

Q. Now, who is Mr. Adams? What is his first name or initials? A. Lowell, L. C. is his initials.

Q. And he was dock steward at Santa Fe for
358 Teamsters Local 886, is that correct? A. Yes, sir.

Q. Just start in and tell us what happened upon this occasion. A. Well, this American Iron brought in a shipment——

Trial Examiner: Keep your voice up, please.

A. The American Iron brought a shipment into the dock and he brought it into my office to be blocked for the run which the shipment would go in, and Mr. Adams followed him in the office and said not to block the bill there.

By Mr. Pickering:

Q. Now, do you ordinarily block bills of lading, shipments brought to Santa Fe dock? A. Yes, sir.

Q. Did you at that time ordinarily block bills of lading brought to the Santa Fe dock? A. Yes, sir.

Q. That was part of your job duties at Santa Fe at that time? A. Yes, sir.

Q. Now, at that time were you a dues paying member of the Teamsters Local 886? A. Yes, sir.

Mr. Pickering: May it be stipulated that the job that Mr. Futrell was working in as dispatcher at Santa Fe on October 20 was a job that was not covered by the Teamsters contract, certification with the Santa Fe Company?

Mr. Grayson: Yes, sir, it may be so stipulated.

359 By Mr. Pickering:

Q. As I understand it, Mr.——

Trial Examiner: As I understand it, now, he was a member of the union but he wasn't occupying a job covered by the existing contract, is that right?

Mr. Grayson: That's right.

Trial Examiner: All right.

Mr. Pickering: In other words, he was not in the bargaining unit represented by the Teamsters Union at Santa Fe.

Mr. Grayson: That's right. For clarification, as I understand it, Mr. Futrell was a dues paying member of the union at his request. Is that right?

The Witness: Yes, sir.

By Mr. Pickering:

Q. You had made some arrangement with the union and Santa Fe where you could hold this job as a dispatcher and pay your dues in the union for some seniority purpose or something isn't that right? A. Yes, to hold seniority as well.

Q. Did you later that day block the bill of lading for the American Iron shipment that you at that time refused to block? A. No, sir.

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369 Loy Oscar Mayo.

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Mr. Pickering: It can be stipulated, can it not, that Mr. Mayo, who has just taken the stand, is an employee who acted as a picket for the Machinists Union during the time you were on strike concerned within the complaint?

Mr. Poulton: Yes.

Direct examination.

By Mr. Pickering:

Q. Would you give your full name and address for the reporter, please. A. Loy Oscar Mayo, 1633 Northwest Fourth, Oklahoma City.

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Q. Now, Mr. Mayo, we understand that you at least on one occasion or so acted as a picket for the Machinists Union at the premises of some carriers here in Oklahoma City. Could you tell us what carriers those were. A. Just what do you mean? Do you mean the places I went?

Q. Places, yes, sir. A. Well, I went to, just one time is all I went, I went to Gillette and Lee Way, the two places.

Q. All right, sir, and I show you now what has been marked as Respondent Machinists Exhibit 1 and ask you if you ever saw an apron similar to this. A. Have I ever saw one?

Q. Yes. A. Yes, sir.

Q. Was the apron that you wore at the premises of Lee Way, and where was the other place? A. Gillette.

Q. Gillette, similar to this apron? A. Well, they was a whole lot similar to it.

Q. Now, I call your attention to the first line, I. A. of M.; was that on the apron that you wore? A. Yes, I think that's on all of them.

Q. I call your attention to the next line, Machinists, was that on the apron that you wore? A. I imagine it
371 was. It was on all that I seen.

All right, sir. I call your attention next to the line that has 850 on it. Was that on the apron that you wore? A. I think it were, to the best I can remember.

Q. I call your attention next to the balance or to the part of the lettering immediately under 850. That states "On Strike;" was that on the apron that you wore? A. That's the way it looks to me.

Q. All right, sir. Next I call your attention to the part just under "On Strike," A. F. of L.; was that on the apron that you wore? A. I think it was. Presume it was.

Q. I call your attention next to the small embroidering on the bottom of this apron, which is, states, "We do not ask anyone to cease work," and ask you whether or not the picket apron that you wore at the premises of Gillette and Lee Way had those words upon the apron. A. I didn't look very close. My eyes didn't fall upon it. It's on some of them that I didn't pay real close attention.

Q. You didn't pay real close attention? A. I didn't pay real close attention to the small writing.

Q. Can you tell us whether or not you saw the words, "We do not ask anyone to cease work," upon the apron that you wore? A. I couldn't say just exactly; I didn't read it.

Q. Pardon? A. I didn't read it. It could have
372 been there and I could have seen the——

Q. I am not asking you, Mr. Mayo, what could have been there. My name might have been there, I don't know, but I will ask you this question; can you state whether or not you saw the words, "We do not ask anyone to cease work," on the apron that you wore? Did you see those words on the apron? That ~~can be answered yes or no~~. Either you saw it or you didn't.

Mr. Poulton: I object. Let the witness answer the way he wants to.

Trial Examiner: That's all right. You can both develop it. Go ahead. You may answer.

A. The ones that I wore to the plant——

By Mr. Pickering:

Q. Just a minute. A. —was blank.

Q. Pardon? A. The ones I wore to the plant, to the American Iron, I think they were blank. I don't——

Q. Were blank? A. I believe they were.

Q. And didn't have this "We do not ask anyone to cease work" on it? A. There at the plant.

Q. How about the ones you wore at the premises of Lee Way and Gillette? A. I didn't see it on there. If
373 you will——

Q. Did you read——

Mr. Poulton: Let the witness finish his answer, please.

Trial Examiner: Go ahead.

A. The way it were, this was my first occasion, see, to follow the truck, and the aprons were rolled up in the car, and when we got out I carried the apron under my arm till we got to the——

Mr. Pickering: Mr. Examiner, I do not think that this is responsive to my question.

Trial Examiner: Just a moment.

Mr. Pickering: I move to strike what the witness has said. I asked him a question that can be answered perfectly obviously either yes or no. Now, if this witness will desire to qualify that answer after he gives me an answer either yes or no, he may, but I submit I am entitled to a yes or no answer on a question of that nature.

Trial Examiner: I am going to let him finish. He is trying to tell the circumstances. Go ahead with your answer.

Mr. Pickering: Mr. Examiner, I submit my question was not—I did not ask him what the circumstances were.

Trial Examiner: I said I am going to let him finish the answer the way he is giving it. He is giving us the circumstances. Go ahead.

A. The aprons that the picket captains had in their car were all rolled up, and when we got to the place,
374 Gillette, I took the apron under my arm and went to the American Iron truck where it was there at the dock and I didn't put it on or unroll it until I got to the truck. When I unrolled it I just put it on and I didn't take time to read exactly the words that was upon it, but I knew it was a strike apron.

Trial Examiner: All right. Next question.

Mr. Pickering: Now may I have an answer to my question, Mr. Examiner?

Trial Examiner: I think you are not—the witness isn't getting a fair opportunity to express his opinion on it. Now give him a chance to get at this correctly.

Can you state that from your observation of the picket apron, can you state positively that those words, that bottom line, were on the apron that you were wearing?

The Witness: I couldn't state it that they were or they weren't.

Trial Examiner: All right, next question.

Mr. Pickering: Now, that wasn't my question, Mr. Examiner. My question was did he see——

Trial Examiner: All right, ask any question you want.

By Mr. Pickering:

Q. I'll ask you again, then, Mr. Mayo, did you see the words, "We do not ask anyone to cease work," on the picket apron that you wore either at Lee Way or Gillette?

Mr. Poulton: Don't answer the question. I believe that question has been answered before, Mr. Ex-
375 aminer.

Trial Examiner: No, I'll allow it. Go ahead.

Read the question to him.

(Question read.)

A. I didn't see the bottom words at that particular place when I put the apron on.

By Mr. Pickering:

Q. Did you see any words on the bottom part of this apron, or the picket apron that you wore which was similar to this apron I hold in front of you, which is Respondent Machinists Exhibit 1; did you see any words of any kind on the bottom part of this apron that you wore at Lee Way or Gillette in the same vicinity as these words appear on this apron that I hold in my hand where it states, "We do not ask anyone to cease work?" Did you see any words in that part of the apron? A. I don't remember just exactly whether I do or not remember.

Trial Examiner: Well, I think you testified you are sure that the pickets at the plant itself wore aprons which did not have that bottom line on it, is that correct?

The Witness: I think that's correct.

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389 **James P. Smith.**

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Pickering:

Q. Would you give your full name and address for the reporter, please. A. James P. Smith, 1100 Southwest 49th, Oklahoma City.

Q. Mr. Smith, you are the Santa Fe freight agent here in Oklahoma City, is that correct? A. Yes, sir, I am.

Q. And you are in charge of Santa Fe's Oklahoma City operations? A. Yes, sir.

Mr. Poulton: May we go off the record?

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

By Mr. Pickering:

Q. Now, Mr. Smith, in connection with your job at Santa Fe, do you know whether or not there was an occasion about the 16th of September when a driver, Santa Fe driver, refused to haul a shipment of American Iron freight? A. Santa Fe road operations refused to—

390 Santa Fe road operator refused to pull his schedule that had America Iron shipments located on his trailer.

Q. What was that road operator's name? A. It was Mr. Greenstreet.

Q. Is that Mr. O. J. Greenstreet? A. O. J. Greenstreet.

Q. Do you know who loaded the freight upon the trailer that Mr. Greenstreet was to pull? A. It was on September 16, and the shipment was loaded by the dock personnel.

Q. Do you happen to know the name of the dock personnel who handled the American Iron shipment? A. It was Mr. Hert acting in the capacity of checker, and I believe at that time a casual laborer employee by the name of Rogers, Jimmy Rogers.

Q. As I understand, Mr. Greenstreet's home terminal is Wichita, Kansas, is that correct? A. That is correct.

Q. Now, was there any refusal on the part of any road operator to haul American Iron freight after this occasion? A. Yes, sir, there was.

Q. When was that, please, the next such refusal?

Mr. Grayson: If the Trial Examiner please, we have admitted all this. I don't see what the purpose of it is.

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397 Trial Examiner: The question was what did you do about the shipments after Greenstreet refused to haul the trailer.

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A. We unloaded the shipments and they were placed in the boxcar. Those boxcars were carted to Wichita, Kansas. That was the only——

By Mr. Pickering:

Q. The shipments went by rail then, is that correct? A. That is correct. That is the only shipments that were in those, in that car.

Q. Who unloaded the shipments off of the trailers before they were put in the railway cars? A. They were unloaded by our general foreman Mead.

Q. Now, on this occasion on September 17 you stated that after Mr. Foster left the American Iron shipment was checked and receipted for by Checker Goho.
398 Did he do that without instructions from you or with instructions? A. No, sir, I instructed him. He was the first checker that I instructed and he accepted the bill of lading without any protest.

Q. Do you ordinarily have to instruct checkers to check and receipt for freight brought to Santa Fe docks? A. No, sir.

Q. Was there any occasion after this when American Iron freight was brought to Santa Fe docks and checkers refused to receipt and check the freight? A. Yes, sir, henceforth from that date the dock personnel refused to handle it.

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400 Q. Now, from the first occasions that the dock employees at Santa Fe refused to handle American Iron freight did you ask any of them why they were refusing? A. Yes, sir, I did.

Q. What did they tell you upon the first occasion that you asked them why they were refusing to handle American Iron freight? A. They told me that they had been instructed not to handle it. I asked them from where these instructions came and on the first three or
401 four occasions I was told that their instructions came from their steward.

Q. All right, sir, on these first three or four occasions did any of the dock employees that you asked the reasons

for not handling American Iron freight mention anything at all about their contract? A. No.

408 Q. Did you ever make any recommendations to any of your superiors concerning the refusal of the dock employees to handle American Iron freight? A. Yes, sir, I did.

Q. What did you recommend? A. Well, on the few occasions that I attempted to get their cooperation I had
409 been advised by other terminal managers during this period that their dock people were handling their shipments, that the road operators were pulling the runs so I recommended that we take a little more positive action and state our position to the employees where there could be no doubt in their minds that we were going to handle every shipment that American Iron offered to us.

Q. Did you at any time make any recommendations other than that for any other disciplinary action insofar as their refusal to handle American Iron shipments? A. No, sir.

Mr. Pickering: That's all.

Cross-examination.

By Mr. Grayson:

Q. Mr. Smith, it has been stipulated here in the record that your company has a contract with Local Teamsters 886, in which there is a clause commonly referred to as a hot cargo clause, Article 4, Section (b), I believe it is. You are familiar with that provision of the contract, are you not? A. I am familiar with it, yes.

Q. Pardon? A. I am familiar with that Article 4, Section (b). I am also in making that acknowledgment, I don't want to leave the impression that I agree with your interpretation of that Section (b). Now, there's no argument about Section (a) of Article 4.

411 James W. Hancock.

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Pickering:

Q. Would you state your full name for the reporter, please. A. James W. Hancock, better known as Bill.

Q. And your address? A. 5416 North Mueller, Bethany, Oklahoma.

Q. And you are employed by American Iron and Machine Works Company as a mailman, is that correct? A. Yes, sir.

Q. During the period of time that American Iron was on strike from September 15 through October 21 it has been testified that you hauled freight of American Iron to the premises of Santa Fe, Lee Way, Hall, T. I. M. E. and Gillette here in Oklahoma City, is that correct? A. That's right.

Q. Would you tell us, please, if pickets followed you to the premises of Santa Fe, Lee Way, D. C. Hall, Gillette and T. I. M. E. on the first occasion that you had to haul American Iron freight to those carriers' premises after the strike began? A. Made all of them.

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412 The Witness: Yes, sir.

Trial Examiner: From the time, first day of the strike?

The Witness: It was about the second day, I believe, after the strike started they followed me, the 16th or 17th; I don't know which.

By Mr. Pickering:

Q. All right, now, Mr. Hancock, were those Machinists' pickets? A. Yes, sir.

Q. Did they picket any while you were at the premises of Hall, Santa Fe, Gillette, T. I. M. E. and Lee Way? A. They did.

Mr. Poulton: I don't know whether this is relevant as really preliminary or not. I don't want to confuse it. We have already admitted that, no question here.

By Mr. Pickering:

Q. Now, on this first day which you place about September 16th or 17th, so that you hauled freight to carriers here at Oklahoma City, did you also go to the premises of J. H. Rose? A. I don't recall whether I went to Rose that day or not, that I made all those places.

Q. Did you have occasion to go to the premises of J. H. Rose? A. Oh, yes, I went out there several
413 trips.

Q. Did pickets ever follow you to the premises of J. H. Rose? A. Yes.

Q. Did they ever picket at the premises? A. No, stopped at the gate, the drive-in, at the end of the drive where they go in.

Q. Now, on this first day that you place about September 16th, the pickets followed you to the premises of Hall, Lee Way, T. I. M. E., Gillette and Santa Fe, could you tell us, please, who those pickets were who followed you on that first day? A. On the first day?

Q. Yes, sir. A. Well, the first day, the first trip George Wimberly, and I think it was Leo Feltner the first trip followed us.

Q. Now, did either Leo Feltner or George Wimberly say anything to any employees of any of the carriers that I have just named? A. Well, George Wimberly got out of the car and beat me up on the dock before I could get up there with my freight bills and talked to somebody, I don't know just who he talked to before I could get up there.

Q. You would see him talking with someone, is that right? A. Yes, sir.

Q. Did you overhear the conversation? A. No, I did not.

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414 By Mr. Pickering:

Q. Did Mr. Wimberly go up on the dock at any of the other carriers on your first trip out other than Santa Fe? A. Yes, sir, each dock he went up on the dock.

Q. Did he go up on the dock at Lee Way? A. I don't remember now whether at Lee Way—I don't remember seeing him go up on the dock there, but he went the other places.

Q. Did he go up on the dock at Gillette? A. Gillette, yes.

Q. Did you see him talking with any of the Gillette employees? A. No, I didn't.

Q. Pardon? A. I didn't see him talking to them; I just seen him go up on the dock at Gillette.

Q. Did he go up on the dock at T. I. M. E.? A. Yes.

Q. Did you see him talking to any of the employees at T. I. M. E.? A. He just talked to some of the boys there on the dock and then went back to his car.

Q. In relation to when you backed up to the dock and got your, or unloaded your freight, American Iron
415 freight, at T. I. M. E., did you see Mr. Wimberly talking to the T. I. M. E. employees before or after you had unloaded your freight? A. He talked to them before I got up on the dock. He beat me up there.

Q. Now, on that occasion did the T. I. M. E. employees accept your freight? A. I believe that first trip, I believe this fellow that was, that testified here, I believe he accepted my freight the first trip. I am pretty sure he did.

Q. All right, sir. Do you recall what happened on your first trip at Santa Fe? A. Well, we—that part we got through with. Santa Fe was the first stop on this first trip. That's where Wimberly went up on the dock and talked to somebody. I just mention it. I don't know who they talked to.

Trial Examiner: Counsel's question was did they accept your freight at Santa Fe.

The Witness: Yes, sir.

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416 By Mr. Pickering:

Q. Now, Mr. Hancock, on this second trip you made, did you go to Santa Fe? A. Second trip, yes, sir.

Q. What did Mr. Foster do when you got to Santa Fe? A. Well, he got up on the dock and was talking to someone up there and I went on in the office to get my freight bills blocked, see, then, out to find the checker and he was talking to Mr. Smith right by my truck.

Q. All right, what did you hear Mr. Foster say to Mr. Smith? A. Well, I didn't hear what he said. I just heard a few words that Mr. Smith said.

* * * * * * * * * * *

426 Mr. Poulton: At this time the Respondent Machinists would like to make a motion to dismiss the complaint and bill of particulars so far as it alleges that George Wimberly, on or about February 16 at the Oklahoma City terminals of Santa Fe, Gillette, T. I. M. E., Hall and Lee Way, made oral requests to the employees in an effort to have them refuse to accept, load or unload or otherwise handle American Iron freight.

That's my first motion.

Trial Examiner: What about that, Mr. Pickering?

Mr. Poulton: There's no evidence to that effect.

Mr. Pickering: It is my recollection that there is evidence, Mr. Examiner, and I do not purport to try to remember all the evidence that has been given here in the three days case.

Trial Examiner: Well, I'll have to reserve decision on that. I'll review the record carefully and, of course, you gentlemen can do the same and point that out to me. At the present time I would say my recollection favors Mr. Poulton's motion, but I don't want to give a final ruling on it.

Mr. Poulton: I would like to save myself in calling
427 the extra witness, but I still don't think it is necessary.

Number two, I would like to make a motion to dismiss the complaint and bill of particulars so far as it alleges that Edd Foster, on or about September 16, 1954, orally requested the employees to refuse to accept, check, load or unload or otherwise handle American Iron freight at Santa Fe. If my recollection is correct, and I believe it is, the entire evidence in the record at this time is that Mr. Foster talked with Mr. Smith, who is a supervisory employee. There is evidence in the record that other employees may have been around, but there is no evidence on the record whatsoever that the other employees overheard the conversation.

Mr. Pickering: There is evidence on that, Mr. Examiner, that they were close enough to overhear it. It was a normal tone of voice and the Examiner will have to make a finding and an inference that can be drawn that they did overhear it.

Mr. Poulton: Sir, the General Counsel has the burden of proof in this case. We do not run on surmise or deduction whether they heard it or didn't hear it is no evidence that they did.

Mr. Pickering: I might state, in connection with that, Mr. Examiner, there is a case by the Board which holds that where statements are made to supervisory employees that are overheard by employees it can be considered inducement and encouragement of the employees, even though the statement itself was directed to a supervisor.

428 Mr. Poulton: I will not deny there is such a case, but I believe in the case you will find there was evidence that the employees overheard statements.

Trial Examiner: I'll reserve decision on that motion and you gentlemen can, of course, cite authority.

Mr. Poulton: I would like to make a motion to dismiss the allegations in the complaint and the bill of particulars

to the effect that Edd C. Foster on or about September 22, 1954, induced, orally induced the employees of D. C. Hall to refuse to accept, handle, et cetera, et cetera, on the grounds the only evidence in the record at this time is that Edd Foster casually talked to the dock hand. There is nothing in the record whatsoever to the effect that he requested these employees, the employees to cease handling the freight.

Trial Examiner: Any comment on that?

Mr. Pickering: Where was that at?

Mr. Poulton: That's the 22nd at Hall.

Mr. Pickering: There is evidence that after he talked to the dock hand there was, might have been a refusal to handle.

Mr. Poulton: There is no evidence, though, any oral request, sir.

Mr. Pickering: From that evidence it is the position of General Counsel that inference could be drawn that that was the subject of his conversation.

Mr. Poulton: As I understand now, General Counsel is trying to build the case up on surmise and conjecture.

Trial Examiner: That's a matter of argument, but certainly I want to see authority on that, on all these motions, of course. I'll reserve decision on this one, too.

Mr. Poulton: I don't believe there is any evidence in the record whatsoever that Mr. Foster talked to any of the employees in an effort to induce them to refuse to accept, check, load or unload or otherwise handle American Iron freight at Lee Way on September 17. Mr. Gray testified it was on September 16. There is a conflict between whether it was the 16th or 17th, but either on both days there is no showing there was any oral request or inducements. Now——

Trial Examiner: When you finish your motion, just let us know.

Mr. Poulton: All right.

Mr. Pickering: On that, as far as the dates were concerned, Mr. Examiner, the allegations are on or about certain days. The allegations do not go to a particular day.

Trial Examiner: The question is whether or not he made any such statement at Lee Way.

Mr. Poulton: There are two allegations in here, one on the 16th and one on the 17th. There is only proof of one day there was—he made an allegation to Smith. Furthermore, I think the allegation to Smith should be dismissed, anyhow; a supervisory employee. I don't believe——

430 Trial Examiner: Let me say this as to all the matters of evidence, I suggest you make all of them and frankly my feeling right now is unless there is a concession I will have to reserve decision and scrutinize the record.

Mr. Poulton: Let me put it this way, the Respondent Machinists would move to disiniss the complaint and the bill of particulars as to Section 8, the part of Section 8 I should say that is not admitted, and the bill of particulars, Section 1 also——

Trial Examiner: Section 8 of the complaint.

Mr. Poulton: That's correct. Mr. Examiner, let me say this, it wouldn't be the entire Section 8, it would be Section 8 starting with the word "coincident with the maintaining of picket or pickets," et cetera. Also the Respondent Machinists would move to dismiss Paragraph II of the bill of particulars on the same grounds as stated previously. The Respondent Machinists would also move to dismiss Section 9 of the complaint on the grounds that the evidence is not sufficient to support the allegations. As I remember the evidence it is two words, union card, and that is all.

And over-all there is an over-all dismissal, the Respondent Machinists would move to dismiss the complaint in its entirety in that the General Counsel has the burden of proof and the respondents do not believe that he has met that burden at this time. So ends my motions.

431 Trial Examiner: I will reserve decision on those motions.

Any motions on the part of the Teamsters?

* * * * * * * * * *

433 **Robert Pickett,**

a witness called by and on behalf of the respondent, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Poulton:

Q. Will you state your name and address for the record, please. A. Robert Pickett.

Q. Your address, sir? A. 2620 Moulton Drive, Oklahoma City.

Q. Mr. Pickett, did you ever accompany the pickets
434 to the various carriers, such as T. I. M. E., Lee Way, Santa Fe, Gillette and Hall? A. Yes, sir.

Q. Did you give the pickets an apron to wear when they got out of your car, sir? A. Yes, sir.

Q. Could you identify this apron for me, sir? A. Yes, sir.

Q. Is this the apron that you handed them, sir? A. Yes, sir.

Q. This apron or a similar apron? A. That is one similar to it, had the same writing on it.

Q. Did it have this bottom line on it, sir, "We do not ask anyone to cease work"? A. Yes, sir.

Q. Approximately how many times, to your knowledge, did the pickets wear this apron, sir, while you were with them? A. While I was with them I imagine 10 or 12 times.

Q. Ten or twelve times. Did you, while you were on picket duty, see any other apron be used, sir, on the roving pickets? A. Yes, sir.

Q. What apron was that, sir? A. It was the one like we wore.

Q. American Iron? A. American Iron front.

435 Mr. Poulton: I would like to offer this now, Mr. Examiner.

Trial Examiner: It is in.

Mr. Poulton: It is in evidence, but in evidence for limited purpose; it was the apron that Mr. Gray identified at the injunction proceeding. I would like to offer it now.

Trial Examiner: That's in for whatever relevancy it has here.

Mr. Pickering: Mr. Examiner, I believe that you are mistaken on that. As I understood your ruling at the time, and certainly as far as the exhibit going in without objection from me it was for a limited purpose that that being the picket apron which was used in the previous hearing here.

Trial Examiner: I can't go back and——

Mr. Poulton: That is correct, Mr. Feiler. That's why I offered it again for all purposes.

Mr. Pickering: I object to the introduction of this for any other purpose than that.

Trial Examiner: Overruled. I will allow it in evidence.

By Mr. Poulton:

Q. Now, Mr. Pickett, did you accompany a picket to Lee Way on September 17? A. I don't—I couldn't tell you the date, whether it was the 17th.

Q. Did you go to Lee Way at any time? A. Yes, sir.

Q. It has been stipulated here that the strike at
436 American Iron started on September 15. Could you tell me how many days after the start of the strike that you went to the premises of Lee Way with the picket? A. Three or four. I don't know for sure just exactly.

Q. But you did go to Lee Way? A. Yes, sir.

Q. Did you talk to anyone there, sir? A. I talked to some man on the dock. I don't know who he was.

Q. You say you talked to some people at Lee Way, is that correct, sir? A. Yes, sir.

Q. Do you remember what you said to those people, sir? A. I just asked them if the shop steward was around there.

Q. Did you say anything else? A. Well, that is, a guy wouldn't tell me and I asked another boy as I started to leave and asked him who the guy was that signed for it.

Q. Do you remember ever seeing the shop steward, sir? A. Not that I know of, no, sir.

Q. Do you know a Mr. William R. Hall? A. No, sir, I don't.

Q. Were you present at the injunction hearing October 16, 1954, in this courtroom? A. Yes, sir.

Q. Do you remember a gentleman pointing you out
437 at that hearing, sir? A. Yes, sir.

Q. Do you remember whether that was Mr. Hall or not? A. I think it was, pretty sure it was.

Q. Do you know what Mr. Hall does at Lee Way, sir? A. No, I don't.

Q. Do you remember seeing him at Lee Way, sir? A. Yes, I remember now seeing him.

Q. Did you talk to him, sir? A. He's the guy that I asked who was the guy that was going to sign for the freight and he wouldn't tell me.

Q. Did you say anything else to him? A. No.

* * * * * * * * * * *

440 Redirect examination.

By Mr. Poulton:

Q. Calling your attention to September 17, sir, were you at approximately 3:00 p. m. the picket captain on duty at the American Iron premises? A. Yes, sir.

Q. And those premises are located where, sir? A. 518 North Indiana.

Q. Did you talk to an employee of Santa Fe Truck Company there, sir? A. Yes, sir.

Q. At approximately 3:00 p. m? A. Yes, sir.

Q. 3:00 p. m.? A. Yes, sir.

Q. What did he say to you and what did you say to him? A. Well, he just wanted to know where he could find Edd Foster and I told him I didn't know.

Q. Did he say anything else? A. Yes, he told me about receiving some American Iron products down there the day before and when he came in, why, the boys were up in an uproar about it. He said that they unloaded this, took them about three hours to get it off the truck before a driver would take it out.

Q. Did he say anything else? A. Well, we talked a little bit. I don't remember just what all it was about, but I do remember him saying that they'd try to stick with us during the strike.

442 Q. Do you remember asking him not to handle freight for American Iron? A. No, sir, I didn't.

Q. Did you talk to him about the secondary boycott by any chance? A. Well, I told him I didn't know too much about it right then, you ought to see Edd to talk about it, find out about that.

* * * * * * * * * * *

Mr. Poulton: I would like to have this marked.

443 (Thereupon the document above referred to was marked Respondent Machinists' Exhibit No. 2 for identification.)

Mr. Poulton: I believe that the General Counsel will stipulate with me that this is an authentic copy of the agreement entered into on October 21, 1954, between the American Iron and Machine Works Company and the International Association of Machinists, is that correct, sir?

Mr. Pickering: That's right.

Trial Examiner: I think that's been marked Respondent Machinists' 2.

Mr. Pickering: The document that he holds in his hand is authentic.

Mr. Poulton: I would like to offer it in evidence.

Mr. Pickering: Would you like to have it marked first?

Trial Examiner: It's marked Respondent Machinists' 2 for identification. It is offered in evidence. Any objection?

Mr. Pickering: Yes, sir. That document, Mr. Examiner, has nothing at all to do with the issues of anything that is framed by the answer or the complaint or any other pleadings in this case, any testimony in this case; it has been stipulated that the strike terminated on October 21, 1954, and I will stipulate with Mr. Poulton that it terminated upon the completion and signing of that, of an agreement. However, the terms of any agreement they have reached have nothing whatsoever to do with
444 any of the issues in this case.

Trial Examiner: All right, in view of the stipulation that there was an agreement between the company and the Machinists, do we need the agreement?

Mr. Poulton: Yes, sir, I think so. There is a provision I am trying to find now, Article 26, which I think goes to my argument on mootness. It's a no-strike and lockout clause. I think it fits very well on my mootness argument.

Trial Examiner: It has a no-strike and lockout clause?

Mr. Poulton: That's correct. I think that's important.

Mr. Pickering: I fail to see how any provision that might be in this contract would have anything to do whatsoever with the issues framed by the pleadings in this case and testimony and the evidence so far.

Trial Examiner: How would the no-strike and lockout clause be relevant?

Mr. Poulton: I think it stops us from striking. Let me read it.

Mr. Cotter: By way of summary it provides that there would be no strike or lockout excepting in the event one party or the other should fail to observe an arbitrator's award.

Mr. Poulton: And also, I would like to submit, that the duration clause is another important factor in the argument on mootness, sir.

Trial Examiner: Right now I tend to lean towards
445 Mr. Pickering's point. However, the issue has been raised, it has been raised before the Board which

gave a preliminary ruling to turn it down with a request to appeal my ruling. I will allow it in and only for the purpose of giving the Machinists a chance to brief the point.

Mr. Cotter: Can't you handle it as a rejected exhibit?

Mr. Pickering: I think, Mr. Examiner, in view of your ruling on his question he raised as to mootness that that would be the proper way to handle this, that it go in the rejected exhibit file and with that explanation in the record.

Mr. Poulton: Let me say the rejected exhibit file is not to be considered unless the ruling on the exhibit is overruled by the Board.

Trial Examiner: I will allow it in so that this question of mootness can be briefed.

(The document heretofore marked Respondent Machinists' Exhibit No. 2 for identification was received in evidence.)

Mr. Pickering: Mr. Examiner, might your admission of this then be limited strictly to the question that Mr. Poulton raised as to the mootness of the case against the Respondent Machinists which the Examiner overruled and his appeal before the Board, or his request for an appeal was denied by the Board and for no other purpose?

Mr. Poulton: I will so stipulate to that, Mr. Pickering.

446 Mr. Grayson: Now, Mr. Pickering's statement was you limited this to the question of mootness that Mr. Poulton raised. The Teamsters raise the same question and I want it to be applied likewise to the Teamsters.

Trial Examiner: All right, the contract is received only on the question of mootness and primarily gives the parties a chance to brief the point.

* * * * * * * * * * *

a witness called by and on behalf of the Respondent Teamsters, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Grayson:

Q. State your name. A. Ralph Mitchell.

Q. Mr. Mitchell, you have been sworn as a witness, have you not? A. I have.

Q. Where do you live? A. 200 Southeast 26th Street, Oklahoma City.

Q. What is your job or occupation? A. Business representative for the Teamsters Union.

Q. As business representative for Teamsters Union,
447 over what particular division do you have charge of? A. Motor freight division.

Q. Mr. Mitchell, you have been present during the entire hearing of this case, is that right? A. That's right.

* * * * * * * * * * *

452 Q. Were you here when Wilkerson, the dock steward for Hall, testified? A. I was.

Q. Do you recall that he testified something to the effect that you told him that a union member might lose their book or card, do you remember him testifying to that? A. I did remember.

Q. Well, do you remember talking to Mr. Wilkerson during the strike? A. I do.

Q. Relate, if you know, the conversation which you had with Mr. Wilkerson. A. Well, I walked up on the
453 dock and Mr. Wilkerson asked me, "Can we handle the freight?" I said, "Mr. Wilkerson, you are in violation of the contract as I interpret it."

* * * * * * * * * * *

457 Mr. Poulton: I would like to make a motion to dismiss the complaint in its entirety.

Trial Examiner: I take it you people renew the motions previously made?

Mr. Poulton: Yes, renew the motions I made at the close of the General Counsel's direct case.

Trial Examiner: I will reserve decision on that. Do you people wish to offer oral argument? I know there are a lot of involved issues.

* * * * * * * * * * *

556-588

Teamster's Exhibit No. 1

AGREEMENT

Oklahoma City General Drivers

Warehousemen and Helpers

Local

886

[A. F. of L.]

Local Freight Forwarding

and

Local Cartage

for

Oklahoma City and Vicinity

1952 - 1955

Union Label No. 45

ARTICLE 4

Picket Line

(a) The Union and the Employer agree that it shall not constitute a breach of this Agreement for any employee or Union member covered herein to refuse to cross a picket line or to refuse to enter upon the premises of an Employer if such refusal does not constitute a violation of the Labor Management Relations Act of 1947.

(b) Members of the Union shall not be allowed to handle or haul freight to or from an unfair company; provided, this is not a violation of the Labor Management Relations Act of 1947.

531-564 **Machinist's Exhibit No. 2**

AGREEMENT

Between the

AMERICAN IRON & MACHINE WORKS COMPANY

and the

INTERNATIONAL ASSOCIATION OF MACHINISTS

September 15, 1954

AGREEMENT

THIS AGREEMENT, entered into this 21st day of October, 1954, by and between the AMERICAN IRON AND MACHINE WORKS COMPANY OF OKLAHOMA CITY, OKLAHOMA, hereinafter referred to as the "COMPANY", and local Lodge No. 850 of the INTERNATIONAL ASSOCIATION OF MACHINISTS, hereinafter referred to as the "UNION".

* * * * * * * * * * *

ARTICLE 26

STRIKES AND LOCKOUTS

Section 1. The Union will not call or sanction any strike or concerted stoppage during the term of this agreement except for (1) The Company's failure to abide by the arbitration clause of this agreement, or (2) The Company's failure to comply with any decision of any Board of Arbitration established hereunder within five (5) working days after such decision of a Board of Arbitration, or (3) Failure of the parties to reach agreement on Wage Reopening, Article 38, hereof.

Section 2. Should a strike or concerted stoppage of work by employees of the Company other than those permitted by Section 1, hereof occur during the terms of this agreement, the Union, within forty-eight (48) hours after receipt of a written notice from the Company, shall be obliged to do the following things only:

(a) Advise the Company in writing that the strike or stoppage has not been called or sanctioned by the Union.

(b) Post copies of the following notice on Bulletin Boards in the Plant:

"We have been advised by the American Iron and Machine Works Company that a strike has occurred in the plant. Inasmuch as no strike or stoppage has been called or sanctioned by the Union, if you are engaged in any such strike or stoppage, you are hereby instructed to return to work immediately.

LOCAL LODGE No. 850, of the INTERNATIONAL ASSOCIATION OF MACHINISTS By

THIS NOTICE IS POSTED IN ACCORDANCE WITH THE PROVISIONS OF THE AGREEMENT BETWEEN THE COMPANY AND THE UNION

Section 3. The obligation of the Union shall be limited to the performance of the acts required by Section 2, and upon compliance by the Union with the provisions of Section 2, of this Article of the Agreement, the Union and its officers, agents and members shall have no further liability during the term of this contract or thereafter, for any damage suffered by the Company arising from or out of any stoppage or strike.

Section 4. The Company will not lock out any or all of its employees during the term of this Agreement.

ARTICLE 38

DURATION

THIS AGREEMENT shall become effective on the 15th day of September, 1954, and shall remain in full force and effect for a period of two (2) years. At the end of two years and at the end of each yearly period thereafter, this agreement shall be renewed automatically for periods

of one (1) year unless either party gives written notice of a desire to modify, amend, or terminate same at least sixty (60) days prior to the yearly effective date of this agreement.

It is agreed between the parties that this Agreement, as applied to basic wage rates only may be reopened for negotiation by either the Company or the Union by giving 15 days written notice to the other party prior to March 15, 1955, September 15, 1955, or March 15, 1956, of a desire to negotiate concerning basic wage rates only.

It is further agreed that if this agreement is reopened by either party giving proper notice 15 days prior to September 15, 1955, as provided above, and no agreement is reached within sixty (60) days from the date of the notice to reopen, this Agreement may be terminated upon five days written notice by either party to the other.

* * * * * * * * * *

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,394

GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 886, AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

No. 13,406

LOCAL 850, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

Filed August 3, 1956.

Prehearing Conference Stipulation

Pursuant to Rule 38 (k) of the Rules of this Court, the parties, subject to the approval of the Court, do hereby stipulate and agree as follows with respect to the issues, the dates for the filing of the briefs and joint appendix, and the contents of the joint appendix:

I

STATEMENT OF THE ISSUE

1. Whether the Board properly concluded that petitioner Drivers' inducement or encouragement of employees of common carriers not to handle freight brought to the carriers' docks by a primary employer engaged in a strike with Machinists union was violative of Sections 8 (b) (4) (A) of the National Labor Relations Act, as amended, notwithstanding the existence of a clause in said petitioner's collective bargaining agreement with such carriers stating that the carriers' employees "shall not be allowed to handle or haul freight to or from an unfair company."

2. (a) Whether, as a matter of law, the Board properly concluded that petitioner Machinists violated Section 8 (b) (4) (A) of the Act by picketing the primary employer's trucks at the docks of the common carriers, and by oral appeals to the employees of the carriers not to handle the primary employer's freight at the carriers' docks;

(b) Whether, in any event, the Board's findings in this regard are supported by substantial evidence.

3. Whether the Board erred in not dismissing the complaint against the Machinists because of mootness.

II.

The Briefs and Joint Appendix to Briefs

1. Each petitioner will file and serve its opening brief on or before October 1, 1956. The Board will file one brief in response to petitioners' briefs, which will be served on or before November 1, 1956. Each petitioner shall file and serve its reply brief, if any, on or before November 21, 1956.

2. The joint appendix shall consist of:

A. The following documents contained in the record heretofore certified herein:

(1) The Board's Decision and Order, and the Trial Examiner's Intermediate Report, in Board Cases Nos. 16-CC-37 and 16-CC-48.

(2) The complaint and answer in Case No. 16-CC-47.

(3) The complaint, bill of particulars, and answer in Case No. 16-CC-48.

(4) Board order of April 19, 1956, denying motion for reconsideration of Board's Decision and Order.

B. Such portions of the transcript of testimony in the aforesaid cases as may be designated by the respective parties, as provided below.

3. The parties will, on or before September 3, 1956, exchange designations as to the portions of the transcript of testimony to be printed in the joint appendix. The joint

appendix, to be printed by a printer mutually agreed upon, will be filed with the petitioners' opening briefs, on or before October 1, 1956.

4. It is further agreed that any party and the Court, at and following the hearing in the case, may refer to any portion of the original transcript of record or exhibits herein which has not been printed to the same extent and effect as if they had been printed, or otherwise reproduced, it being understood that any portions of the record thus referred to will be printed in a supplemental joint appendix if the Court directs the same to be printed.

Dated this 2 day of August, 1956.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Order

Upon consideration of the prehearing conference held before me and of the prehearing stipulation presented by counsel for all parties to these cases, it is

ORDERED that the aforesaid prehearing stipulation be approved and that the Clerk be, and he is hereby, directed to file same forthwith.

It is FURTHER ORDERED that the aforesaid prehearing stipulation and this order be printed in the joint appendix and shall govern further proceedings in this Court unless amended by further order of this Court.

Dated: August 3, 1956.

195 In United States Court of Appeals for the District of Columbia Circuit

No. 13,394

GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 886, AFL–CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

No. 13,406

LOCAL 850, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL–CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITIONS TO REVIEW AND SET ASIDE, AND ON REQUEST FOR ENFORCEMENT OF, AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

[File endorsement omitted.]

Mr. Herbert S. Thatcher for petitioner in No. 13,394.

Mr. Louis P. Poulton, of the bar of the Supreme Court of Maryland, pro hac vice, by special leave of Court, with
196 whom Mr. Plato E. Papps was on the brief, for petitioner in No. 13,406.

Mr. Norton J. Come, Attorney, National Labor Relations Board, with whom Mr. Marcel Mallet-Prevost, Assistant General Counsel, National Labor Relations Board, was on the brief, for respondent.

Opinion

Decided May 9, 1957

Before PRETTYMAN, WASHINGTON and BASTIAN, Circuit Judges

BASTIAN, Circuit Judge: These cases involve the issue as to whether or not the so-called "hot cargo" clause[1] in a labor

[1] The "hot cargo" clause in question reads: "(a) the Union and the Employer agree that it shall not constitute a breach of this Agreement for any employee or Union member covered herein to refuse to cross a picket line or to refuse to enter upon the premises of an Employer if such refusal

contract, wherein an employer agrees that his employees shall not be required to handle struck goods, is enforceable by the union party thereto, and whether it (the hot cargo clause) may be used as an excuse by a union on strike to conduct secondary picketing.

The facts found by the Trial Examiner and the majority of the National Labor Relations Board are substantially as follows:

Local 850, International Association of Machinists (hereinafter called Machinists) became involved in an economic strike with the American Iron & Machine Works Company (hereinafter called American Iron) in September 1954. The strike lasted a little over a month, terminating upon the execution of a new collective bargaining agreement. During the course
of the strike the Machinists picketed the three plants
197 of their employer. They also picketed trucks of American Iron when they appeared at the loading platforms of certain carriers. Representatives of General Drivers, Chauffeurs, Warehousemen and Helpers Union, Local 886 (hereinafter called Teamsters) instructed the unloading personnel of the carriers that, under the terms of the hot cargo clause of the contract between Teamsters and the carriers, the employees were not to handle American Iron goods since they were struck goods. Certain of the carriers, despite the hot cargo clause, requested their employees to handle American Iron goods, whereupon Teamsters urged its members employed by those carriers to refuse to handle these goods. One carrier-employer took no action and did not request his employees to unload.

On charges filed by American Iron, the National Labor Relations Board (hereinafter called the Board) issued complaints, filed two days after the new contract between American Iron and Teamsters was signed, against both Teamsters and Machinists by reason of the alleged violation of Section 8 (b) (4) (A) of the National Labor Relations Act, as amended.[2] A temporary injunction applied for by the Board

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does not constitute a violation of the Labor Management Relations Act of 1947. (b) "Members of the Union shall not be allowed to handle or haul freight to or from an unfair company, provided, this is not a violation of the Labor Management Relations Act of 1947."

[2] 61 Stat. 141 (1947): "(b) It shall be an unfair labor practice for a labor organization or its agents * * * (4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials,

was denied by the United States District Court for the Western District of Oklahoma.

198 The complaints of the Board were referred to a Trial Examiner and, after a preliminary report and consideration of the exceptions thereto, the Board, by a majority vote, two of the five members dissenting, directed that Machinists and Teamsters cease and desist from inducing or encouraging the employees of the carriers, or any other employer, to engage in a strike or concerted refusal in the course of their employment to work on or handle freight consigned to or received from American Iron, or any other employer, where an object thereof was to force or require any employer or person to cease doing business with American Iron. Two of the three members of the majority of the Board were of opinion that the hot cargo clause was valid; the third member, concurring in the result of the Board's order, was of opinion that the clause was illegal and did violence to Section 8 (b) (4) (A). The two Board members comprising the majority held in effect that, even assuming that the Act itself does not prohibit the execution of a "hot cargo" clause, nevertheless, the Act does preclude enforcement of such a clause by appeals to employees.[3]

199 From the order of the Board, Teamsters and Machinists filed these petitions asking this court to review and set aside the order; and, in its answer to the petitions, the Board requested that its order be enforced.

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or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * * "

[3] The exact language of the Board's ruling is as follows: "* * * any direct appeal to employees by a union to engage in a strike or concerted refusal to handle a product is proscribed by the Act when one of the objectives set forth in Section 8 (b) (4) (A) is present. Thus, while Section 8 (b) (4) (A) does not forbid the execution of a hot cargo clause or a union's enforcement thereof by appeals to the employer to honor his contract, the Act does, in our opinion, preclude enforcement of such clause by appeals to employees, and this is so whether or not the employer acquiesces in the union's demand that the employees refuse to handle 'hot' goods. Accordingly, in affirming the Trial Examiner, we do not find it necessary to rely as he did, on the fact that the secondary employers herein did not acquiesce in the refusal of their employees to handle American Iron's freight. In our view, it is sufficient that there was direct inducement of such employees by Teamsters not to handle such freight, with an object of forcing the secondary employers to cease dealing with American Iron."

We agree with the four members of the Board who held that the hot cargo clause of the contract was not violative of the provisions of Section 8 (b) (4) (A) of the Act. This seems also to have been held by the Second Circuit in the so-called Conway case.[1] The majority of the Board held, following Sand Door & Plywood Co., 113 NLRB No. 123, that any direct appeal to employees by a union to engage in a strike or concerted refusal to handle a product is proscribed by the Act when one of the objectives set forth in Section 8 (b) (4) (A) is present. See note 3, supra.

With this we disagree. If the hot cargo clause is not violative of Section 8 (b) (4) (A), and we think it is not, such a ruling would, in practical effect render nugatory the clause itself and would leave the employees without
200 adequate remedy. The Board urges that Section 8 (b) (4) (A) was enacted for the benefit of the public. We think that, although the public is involved, this section has for its purpose the protection of those persons who might be subjected to a secondary boycott, which is proscribed by the section.

We are not impressed with the argument that other adequate remedies are open to the employees of the union. Such remedies as are suggested by the Board seem to us to be totally inadequate and not such as are contemplated by the agreement by the employer in the hot cargo clause.

Here the Teamster's conduct only consisted of urging the employees of the carriers not to handle freight from a company which they considered unfair. This was exactly what the carriers had agreed their employees would not be required to do. If an employer may lawfully agree that its employees will not be required to handle freight from a struck company, and such

[1] Rabouin v. National Labor Relations Board, 195 F. 2d 906, 912 (2d Cir. 1952). There the court said: "The union cannot have committed an unfair labor practice under this section in regard to those employers who refused to handle Rabouin's shipments under the terms of the area agreement provision relating to cargo shipped by struck employers. Consent in advance to honor a hot cargo clause is not the product of the union's 'forcing or requiring any employer * * * to cease doing business with any other person.' § 8 (b) (4) (A)." See also Meier & Pohlmann Furniture Co. v. Gibbons, 233 F. 2d 296 (8th Cir. 1956), 143 F. Supp. 409 (1953); Madden v. Local 442, etc., 111 F. Supp. 932 (W. D. Wis. 1953).

a situation arises, it is hard to see how it can be said that, simply because the employees do what they have the right to do, there was a strike or refusal to work. Nor can it be said that there was a "forcing" or requiring of an employer to cease doing business with another person, because the employer was only being compelled to live up to its own voluntary contract entered into in advance of the happening.

It cannot be argued that the actions of Teamsters constituted a sympathy strike or an illegal boycott. The actions taken might have been so regarded had there been no hot cargo clause. In sympathy strikes or illegal boycotts the employers are innocent victims of disputes with which they are not concerned. But where such a clause exists a different situation arises. The secondary employer has consented, knowingly and in advance, to the refusal of its employees to handle goods of the original employer.

It seems to us that the purpose of Section 8 (b) (4) (A)
—is to prevent injury to secondary employers in the dis-
201 putes of others in which the secondary employers are not involved, and to prevent the forcing of such employers to stop doing business with a third person. But, in cases like this one, the secondary employer has agreed, as part of its bargaining contract with its own union, not to handle goods of an unfair employer; and it would seem that Teamsters employed the only effective means in its power to enforce the agreement.

I am authorized to state that Circuit Judge Washington agrees with the foregoing treatment of No. 13,394. He is filing an additional statement.

Circuit Judge Prettyman dissents for reasons which he will state separately.

The Board's order as to Teamsters will be set aside.

II. Appeal in No. 13,406

Petition of Local 850, International Association of Machinists

Machinists urge a number of objections to the Board's findings and order. Among them is that the Board erred in not holding that Teamster's conduct was protected activity and, accordingly, Machinists' conduct in bringing the dispute to the knowledge of the members of the Teamsters' Union was not in violation of Section 8 (b) (4) (A).

Machinists were not parties to the contract between the carriers and Teamsters. But they contend that, since Teamsters and the carriers were parties to a contract containing the hot cargo clause, an essential element to a finding of violation of the Act is missing. Their position is that the handling of American Iron freight (struck goods) by the employees of the carriers was taken out of the scope of their employment by the hot cargo clause and therefore, Machinists could induce carrier employees to exercise their contract right not to
202 handle struck goods. Machinists urge that, since Teamsters were free to honor Machinists' ambulatory picket line, their activity would not constitute encouragement or inducement of Teamsters to engage in a concerted refusal in the course of their employment to handle the goods of another employer.

We agree with the Trial Examiner and the Board majority that the conduct of Machinists must be evaluated independently of that of Teamsters and that the defenses available to Teamsters are not automatically available to Machinists. The latter are neither parties nor third party beneficiaries of the Teamsters-carrier contract.

The Trial Examiner and the Board majority found that after picketing of American Iron trucks began, while the trucks were on the premises of the carriers, dock employees of at least some of the carriers continued to handle American Iron products. Indeed, in some instances there were protests when supervisory employees attempted to move merchandise which would ordinarily be moved by the dock employees who were members of Teamsters. The Board found further that in most instances the dock employees continued to handle American Iron freight until instructed by representatives of their union not to do so.

Here, as above stated, Machinists had no connection with the contract containing the hot cargo clause and Teamsters' contract could not constitute the basis for a defense by Machinists.

We have examined the other contentions of Machinists, among them that the Board erred in not finding that the controversy was moot because the complaint was filed after the strike between Machinists and American Iron had been settled by execution of a new contract. A reading of the Act would

indicate that a complaint may be filed where the party charged "has engaged in or is engaging" in unfair labor practices. There can be no doubt that orders dealing with unfair labor practices have preventive as well as remedial effects.

203 Machinists also contend that their picketing at the carriers' premises was legitimate primary activity aimed only at American Iron employees. This contention is foreclosed by the fact that the findings of the Board were based upon disputed facts; and there is substantial evidence to sustain the findings of the Board.

Circuit Judge Prettyman concurs in the result in No. 13,406 but for different reasons, which reasons he will state in a separate opinion.

Circuit Judge Washington dissents for reasons which he will state separately.

Order of Board in No. 13,394 set aside.

Order of Board in No. 13,406 affirmed.

PRETTYMAN, *Circuit Judge*, dissenting in part and concurring in part: I dissent from Judge Bastian's opinion and proposed judgment in No. 13,394, relating to the Teamsters. In a nutshell my view is that the hot cargo clause cannot be enforced by a strike, because such a strike or refusal to work is flatly forbidden by Section 8 (b) (4) (A) of the Act.

A strike is a concerted refusal by employees to do work the employer wants done. This is the purport of the opinions on the point.[5] A refusal to work is likewise a declination directed at the employer. So, if an employer and his employees agree that certain work shall not be done, and it is therefore not done, there is no "strike" or "refusal to work". Section 8 (b) (4) (A) forbids only "a strike or a concerted refusal in the course of their employment".

204 It follows from the foregoing that, if an employer and his employees agree by contract that the employees need not handle certain goods, and both abide by their agreement, there is no "strike" or "refusal to work". But, if an employer, having entered into such a contract, thereafter refuses to abide by his agreement and directs his employees to handle the goods, and his employees refuse to do so, there is a strike or refusal to work. Such a strike or refusal to work,

[5] See Restatement, Torts § 797 (1939), and the many cases collected under "Strike" in Words and Phrases, especially in the pocket supplement.

where an object is to force the employer to cease transporting the products of another producer, is forbidden by the statute.

It may be that the right vouchsafed the employer by Section 8 (b) (4) (A) cannot be nullified by contract. Section 7 rights cannot be contracted away.[2] And it can be argued that which Congress meant Section 8 rights to be subject to contract it said so, as it did in Section 8 (a) (3).[3] But I need not reach that question, and, since the answer, one way or the other, involves such sweeping considerations, I do not undertake it. On the other hand it may be that the hot cargo clause is a valid contract agreement between the carriers and their employees, and may validly be carried out by both parties. But even so, when a carrier refuses to comply with the contract, even though he is thereby violating the agreement, the Teamsters, his employees, may not strike or refuse to work in order to prevent the handling of the struck goods. I think the employees may not violate the statute in order to enforce their agreement with the carrier.

205 The sum of it is that Section 8 situations can legally be avoided, by contract or otherwise. Employers and employees need not so conduct themselves as to give rise to Section 8 prohibitions. But the terms of the statute cannot be nullified, by contract or otherwise. And so employers and employees cannot agree that even if a situation covered by the statute does occur the statute shall not apply.

I do not agree with the argument that the hot cargo clause has the effect of removing struck goods from "the course of their [the Teamsters'] employment". If such a construction could be placed upon the phrase in Section 8 (b) (4) (A), careful contract draftsmanship could legalize without qualification any otherwise prohibited activity, e. g., the jurisdictional strike, the sympathy strike, and the wildcat strike, by artificially excepting the work involved from the course of the

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[2] N.L.R.B. v. Lorain Co., v. Labor Board, 309 U. S. 350, 84 L. Ed. 799, 60 S. Ct. 569 (1940). See also Bethlehem Steel Company, 80 N. L. R. B. 311 (1950).

[3] Strong evidence of the public interest in the problem is afforded by the fact that the motor carrier which honors a hot cargo clause thereby violates duties owed the public, breaches other contracts, and may well be in violation of another public law, Part II of the Interstate Commerce Act, 49 Stat. 543 (1935), as amended, 49 U. S. C. A. § 301 *et seq.* See the Examiner's Decision in Galveston Truck Line Corp. v. MoA Motor Lines, I. C. C. No. MC-C 1922 (Mimeo. 1957), which involves actions of our appellant Teamsters, Local No. 886, and cooperating motor carriers.

employment governed by the contract. I think the statute cannot thus be nullified.[1]

One of the carriers involved here adhered to its agreement and would not request its employees to handle the goods. Its employees did not strike. So in that particular case I would not affirm the cease and desist order. As to all the other carriers I would affirm as to the Teamsters."

206. I concur in Judge Bastian's proposed judgment in No. 13,406, relating to the Machinists. I also agree with his opinion in that regard, except that I add, since as I have pointed out I think the hot cargo clause could not be enforced by a strike, that it could not have been so enforced by the Machinists even if they had been parties to the contract.

WASHINGTON, *Circuit Judge*, concurring in Judge Bastian's opinion in No. 13,394, and dissenting from the latter's opinion in No. 13,406:

In the *General Drivers* case, I think Judge Bastian is correct in his treatment of the "hot cargo" clause and its effect. That clause is bargained for, and must be presumed to be balanced by concessions which the employer has obtained at the bargaining table. To say that the employer is free in his discretion to recognize or ignore the clause, when a concrete problem comes up, seems to me to encourage lawlessness in industrial relations. Once a valid contract has been made—and contracts such as this have been recognized as valid by the Board and the Second Circuit—both sides are entitled to rely on the prompt and faithful execution of its provisions. I therefore agree that efforts by the Teamsters to induce their own members to abide by the terms of the "hot cargo" clause embodied in their collective bargaining agreement are not violative of Section (8) (b)-(4) (A).

The same reasoning impels me to the conclusion (in No. 13,406) that the efforts of the Machinists, directed toward the same end, are similarly outside the scope of the statutory

[1] The Board's rejection of this argument on another ground, Sand Door & Plywood Co., 113 N. L. R. B. 1210, 1217 (1955), was cited with approval by the Sixth Circuit in National Labor Relations Board v. Local 11, United Brotherhood of Carpenters, Etc., et al., — F. 2d — (1957).

In National Labor Relations Board v. Local 1976, United Brotherhood of Carpenters, etc., et al., 241 F. 2d 147 (1957), the Ninth Circuit reached the result suggested in this dissent. See also National Labor Relations Board v. Local 11, United Brotherhood of Carpenters, Etc., et al., — F. 2d — (6th Cir. 1957).

207 • proscription. It is true that the Machinists are not a party to the contract which contains the "hot cargo" clause, and not a third-party beneficiary of it. But this does not mean that the existence of the clause has no effect on the lawfulness of the Machinists' conduct. The clause is evidence of the advance consent of the trucking companies that their employees are to refrain from handling struck goods. Because the employers have given this consent and because no basis appears in the statute for permitting this consent to be revoked on an ad hoc basis, the efforts of the contracting union (the Teamsters) to induce employees of the trucking companies to comply with the clause are upheld. The reasoning must be that what is being induced is not a "strike or refusal to work" with an object of "forcing" or "requiring" an employer to cease doing business with another person within the meaning of Section (8) (b) (4) (A). This being so, I cannot agree that what is being induced *is* within the meaning of the statute when the inducing is done by the primary employees, the Machinists. The operative effect of the employer's consent is, in my view, the same regardless of who it is that reminds the secondary employees of the terms of their contract, and seeks to induce compliance with it.

208 In United States Court of Appeals for the District of Columbia Circuit

No. 13,394

GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 886, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

April Term, 1957

No. 13,406

LOCAL 850, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION TO REVIEW AND SET ASIDE, AND ON REQUEST FOR ENFORCEMENT OF, AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before PRETTYMAN, WASHINGTON and BASTIAN, Circuit Judges

Judgment

May 9, 1957

[File endorsement omitted.]

These cases came on to be heard on the record from the National Labor Relations Board, and were argued by counsel.

On consideration whereof, it is ordered and decreed by this Court that the order of the National Labor Relations Board on review in these cases be, and it is hereby, set aside so far as it applies to General Drivers, Chauffeurs, Warehousemen, and Helpers Union, Local No. 886, and that it be, and it is hereby, affirmed so far as it applies to Local 850, International Association of Machinists.

Pursuant to Rule 38 (b) the respondent shall within 10 days hereof serve and file a proposed enforcement decree in case No. 13,406.

Dated May 9, 1957.

Per Circuit Judge BASTIAN.

Separate opinion by Circuit Judge Prettyman dissenting with respect to case No. 13,394 and concurring as to case No. 13,406.

Separate opinion by Circuit Judge Washington concurring as to case No. 13,394 and dissenting as to case No. 13,406.

209 In United States Court of Appeals for the District of Columbia Circuit

No. 13394

GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 886, AFL–CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

No. 13406

LOCAL 850, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL–CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Decree enforcing in part and denying in part an order of the National Labor Relations Board

June 7, 1957

Before PRETTYMAN, WASHINGTON and BASTIAN, Circuit Judges

This cause came on to be heard upon the petitions of General Drivers, Chauffeurs, Warehousemen and Helpers Union, Local No. 886, AFL–CIO (hereinafter called Teamsters) and Local 850, International Association of Machinists, AFL–CIO (hereinafter called Machinists) to review and set aside an order of the National Labor Relations Board dated March 15, 1956. The Court heard argument of respective counsel on January 14, 1957, and has considered the briefs and the transcript of record filed in this cause. On May 9, 1957, the Court

being fully advised in the premises handed down its decision granting enforcement of the Board's order as to the Machinists, but denying enforcement against the Teamsters. In conformity therewith, it is hereby

Ordered, adjudged and decreed by the Court that Local 850, International Association of Machinists, AFL–CIO, and its officers, representatives, agents, successors and assigns, shall:

210 1. Cease and desist from inducing or encouraging the employees of Gillette Motor Transport, Inc., D. C. Hall Transport, Inc., Santa Fe Trails Transportation Company, Time, Inc. and Lee Way Motor Freight Lines, or any other employer, to engage in a strike or concerted refusal in the course of their employment to work on or handle freight consigned to or received from American Iron and Machine Works Company, or any other employer, where an object thereof is to force or to require any employer or person to cease doing business with American Iron and Machine Works Company.

2. Take the following affirmative action, which the Board has found will effectuate the policies of the National Labor Relations Act, as amended (hereinafter called the Act):

(a) Post at its business offices in Oklahoma City, Oklahoma, copies of the notice attached hereto as Appendix A. Copies of said notice, to be furnished by the Regional Director for the Sixteenth Region of the National Labor Relations Board, Fort Worth, Texas, after being duly signed by an official representative of the Machinists, shall be posted by the Machinists immediately upon receipt thereof, and maintained by it for a period of sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to members of the Machinists are customarily posted. Reasonable steps shall be taken by the Machinists to insure that said notices are not altered, defaced, or covered by any other material. The Machinists shall also sign copies of the notice, which the Regional Director shall submit for posting at the Oklahoma City premises of Gillette Motor Transport, Inc., D. C. Hall Transport, Inc., Santa Fe Trails Transportation Company, and Time, Inc. said employers being willing. The Machinists shall also sign a copy of the notice for posting at Lee Way Motor Freight Lines;

211 (b) Notify the aforesaid Regional Director in writing within ten (10) days from the date of this Decree what steps the Machinists have taken to comply herewith.

It is further hereby ordered, adjudged and decreed that those portions of the Boards order applicable to General Drivers, Chauffeurs, Warehousemen and Helpers Union, Local No. 886, AFL–CIO be and it hereby is set aside.

Dated June 7, 1957.

(S) E. BARRETT PRETTYMAN,
Judge, United States Court of Appeals for the District of Columbia Circuit.

(S) GEORGE T. WASHINGTON,
Judge, United States Court of Appeals for the District of Columbia Circuit.

(S) WALTER M. BASTIAN,
Judge, United States Court of Appeals for the District of Columbia Circuit.

212 *Appendix A to decree:*

NOTICE TO ALL EMPLOYEES

Pursuant to a decree of the United States Court of Appeals for the District of Columbia Circuit, enforcing an order of the National Labor Relations Board, and in order to effectuate the policies of the Labor Management Relations Act, we hereby give notice that:

"We will not induce and encourage the employees of any employer other than American Iron and Machine Works Company to engage in a strike or concerted refusal in the course of their employment to perform services for their employer, where an object thereof is to force or require any employer or person to cease doing business with American Iron and Machine Works Company."

LOCAL 850, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL–CIO,
(Labor Organization)

By _____
(Representative) (Title)

Dated _____

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

214 [Clerk's certificate to foregoing transcript omitted in printing.]

Nos. 273 and 324, October Term, 1957

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 886, AFL–CIO; AND LOCAL 850, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL–CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

Order allowing certiorari

October 14, 1957

The petitions herein for writs of certiorari to the United States Court of Appeals for the District of Columbia Circuit are granted, and the cases are consolidated for argument with No. 127. The Unions involved are allowed a total of 3 hours for oral argument and the National Labor Relations Board is allowed a total of one hour and a half for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE 1957

Office - Supreme Court, U. S.
FILED
MAY 13 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 999

LOCAL 1976, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A. F. L.; LOS ANGELES COUNTY DISTRICT COUNCIL OF CARPENTERS; NATHAN FLEISHER,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

JOHN C. STEVENSON,
2200 West Seventh Street,
Los Angeles 57, California,
Attorney for Petitioners.

CHARLES HACKLER,
ARTHUR GARRETT,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. .....

LOCAL 1976, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A. F. L.; LOS ANGELES COUNTY DISTRICT COUNCIL OF CARPENTERS; NATHAN FLEISHER,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

Petitioners pray that a Writ of Certiorari issue to review the Decree of the United States Court of Appeal for the Ninth Circuit entered on March 20, 1957.

Citations and Opinions Below.

The Opinion of the United States Court of Appeal for the Ninth Circuit, dated February 12, 1957, is reported at 241 F. 2d 147 and is printed in Appendix "A" hereto, *infra*, page 1. The Decision and Order of the National Labor Relations Board enforced thereby, is printed in Appendix "B" hereto, *infra*, page 21, and is reported at 113 N. L. R. B. No. 123.

Jurisdiction.

The Decree of the United States Court of Appeal for the Ninth Circuit was entered on March 20, 1957. The jurisdiction of this court is invoked under 28 U. S. C. 1254-1 and Section 10(e) of the Labor Management Relations Act of 1947.

Statute Involved.

The Statutory provisions involved are the Taft-Hartley Act (Labor Management Relations Act, 1947, 29 U. S. C. 141 *et seq.*) 29 U. S. C. A. 151 *et seq.*). The pertinent provisions are printed in Appendix "C" hereto, *infra*, page 49.

Question Presented.

Where the employer has bound himself by the collective bargaining process not to require his employees to work on non-union materials, does the execution of such a provision amount to a violation of the secondary boycott proscription of the statute?

Statement of the Case.

The following statement is verbatim the Statement presented by the Unions in the Ninth Circuit. References therein are to the printed record in the Ninth Circuit designated by the Board and the Unions. In the Ninth Circuit the Unions opposed enforcement of the Board's order on the following contentions, only the last of which is urged here: (1) The Board did not have inassertable jurisdiction over the Unions; (2) On the record considered as a whole there has been no violation of Section 8(b)(4) and (A); (3) There was no strike within the meaning of the Statute; (4) Steinert acted solely as a rep-

resentative of management when he instructed employees to cease their work on the doors; (5) *The Collective Bargaining Agreement was a defense to the charges alleged and found.*

Upon charges filed by Sand Door and Plywood Company, Los Angeles, California, a wholesale jobber of building materials, the General Counsel of the Board issued a complaint, which in substance alleged that Respondents since on or about August 17, 1954 instructed the employees of a building contractor named Havstad and Jensen to refuse to install certain doors because Respondents' rules and by-laws prohibit the installation of products not bearing the union label of the United Brotherhood of Carpenters and Joiners of America, AFL, or an affiliate thereof. [R. 1-2, 5-6.] By this conduct, it is alleged, Respondents have induced and encouraged the employees of Havstad and Jensen, in the course of their employment, to refuse to handle or work on certain doors, the object being to force Havstad and Jensen, and other employers, to cease doing business with the charging party and Paine Lumber Company of Oshkosh, Wisconsin. These acts, it is alleged, constitute unfair labor practices within the meaning of Section 8(b)(4)(A) of the National Labor Relations Act, as amended. (29 U. S. C. A., Sec. 158(b)(4)(A).) The Respondents' answer to this complaint denied the commission of the unfair labor practices alleged and affirmatively averred that the Board lacked assertable jurisdiction over the subject matter of the complaint and the persons of the Respondents.

Sand Door and Plywood Company, the charging party, hereinafter referred to as Sand, is a California corporation, and has an arrangement with Paine Lumber Com-

pany of Oshkosh, Wisconsin for the distribution in Southern California of doors obtained from Paine. There was no labor dispute between Sand and its employees, Sand's intermediary, Watson & Dreps, and their employees, or Paine and its employees. Nor does the record show that Respondents have had any relationships with any of these three concerns. [R. 168-169, 170-171.]

In 1953, Sand received from Paine materials, including doors, valued at $185,796.85, no part of which had any connection with the instant controversy. In 1954, Sand received from Paine materials, including doors, valued at $103,503.05, which were shipped by Paine to various points in the state of California, among which was an item of approximately $9,000.00 [R. 198], being doors purchased by Watson and Dreps, a partnership, who took delivery at Sand's warehouse. The record does not show what Watson and Dreps did with these doors. [R. 171-174.]

Havstad and Jensen, joint venturers, in 1952 began the construction of a hospital and other buildings for the College of Medical Evangelists, in the City of Los Angeles, California. In mid-August of 1954, 398 doors were delivered to the hospital building site, but the record does not reveal how they got there or from whence they came. [R. 187-188, 193.]

Havstad and Jensen, as building contractors, were parties to a Master Labor Agreement [R. 193-195], negotiated in their behalf by the Building Contractors Association, and the United Brotherhood of Carpenters and Joiners of America, for its affiliated District Councils and Local Unions in Southern California [R. 195-196, 197, 201-204.] This agreement governed the wages and working conditions of the employees of Havstad and

Jensen. [R. 201-204.] Among the conditions of employment created by this agreement was a provision that, *"Workmen shall not be required to handle non-union material."* [R. 203.] By the express terms of this agreement, the parties convenanted that they would take no action, by any means whatsoever, "that will prevent or impede . . . the full and complete performance of each and every term and condition hereof." [R. 203-204.]

Arnold Steinert, Havstad and Jensen's foreman, at this building site, whose duties involved the assignment and supervision of work performed by the carpenters and laborers at this location, and who was in charge of the operations in connection with James Nicholson, the general superintendent for Havstad and Jensen [R. 105-106] on August 17, 1954 carried out his usual functions. In the normal course of the work, the employees report for work at 8:00 A.M., but Steinert, as foreman, usually arrives ahead of the employees and lays out his work plans for the day and assigns the various employees to the tasks he has selected for them. After the delivery of these doors in question, Steinert instructed the laborers of Havstad and Jensen to distribute these doors to the various floors of the building, preparatory to their being "hung" by a carpenter, by the name of Sam Agronovich. About the same time, Steinert instructed Agronovich to begin the necessary preparations.

From the beginning of work done that day (8:00 A.M.), until after 11:00 A.M., Steinert was the only official of Havstad and Jensen present at this building site and was then in sole charge of all the employees [R. 131-132]. Shortly before 11:00 A.M. of that day, Nathan Fleisher, business agent of Respondent Car-

penters' Local 1976, came to the building site and met Steinert in the lobby of the building and told Steinert that the doors were non-union and that "We'd have to quit hanging the doors until it was settled." The laborers, pursuant to Steinert's previous instructions, were, at the time, moving the doors from floor to floor, and Steinert instructed them to cease the distribution. [R. 164-165.]

Steinert then went to where Sam Agronovich was working and instructed Agronovich to discontinue the preparatory work, as the doors appeared to be non-union, and assigned Agronovich to other duties. After that, Steinert went on with his work, "going around to check on the work progress of the other employees under his supervision." [R. 165-166.] Fleisher, the business agent of Respondent Carpenters' Local 1976, took no part in any of these attendant conversations or instructions by Steinert. [R. 167-168.]

Nicholson, the general superintendent, reported on the job about thirty minutes after the above occurrence, learned what had happened, and went to the job site looking for Fleisher and found the laborers were waiting for Steinert to assign them to other duties. [R. 113-116, 136.] Nicholson then went directly to Fleisher [R. 132] and asked him why he had stopped the men from hanging the doors. [R. 133-134.] Fleisher said he had taken this action so that it could be determined whether the doors were union or non-union. Nicholson admittedly lost his temper and ordered the employees to "pick up their tools," the equivalent of discharge, but upon calmer reflection directed that Sam Agronovich be assigned to other duties. All other carpenters continued in the performance of tasks previously assigned to them by foreman Steinert. [R. 118, 135.] Neither Nicholson nor

Steinert assigned or attempted to assign any of the other carpenters to the duty of hanging doors. [R. 135.]

James C. Barron, vice-president of Sand, later learned that the hanging of the doors had been stopped and telephoned to Earl Thomas, secretary of Respondent District Council, asking "what the story was regarding the hanging of the doors" and was told by Thomas that he intended to ascertain if the doors were union made, and would advise Barron of his discovery. [R. 177-178.] The following day Thomas advised Barron that the doors were not union made and informed Barron that carpenters could not hang non-union doors. Thomas attempted to persuade Barron to have his company deal in union products and sought to work out a plan whereby the doors could be installed and future installation could be made on conformance with the provisions of collective bargaining agreements that prohibited employees from handling non-union materials. Barron declined to cooperate in these suggestions. [R. 178-180; 186, 191.]

Sand next filed the instant charges and the Board sought an injunction in the United States District Court for the Southern District of California, which was denied. During the hearing in that matter, the judge observed that only one person had been stopped from hanging the doors and that no other carpenters had been assigned to such tasks or requested to do so. The day following this observation, at the instance of Sand, Nicholson, Havstad and Jensen's general superintendent, and a member of the carpenters' union, and Steinert, as superintendent on the job, went to each carpenter, separately, and asked each if he "would be willing to hang the doors" and from each received a negative reply. [R. 136-150.]

Haystad and Jensen did not request Local 1976 to furnish other men to hang these doors. [R. 150-153, 97.]

The Trial Examiner of the Board, who took and heard the evidence, recommended that the complaint be dismissed for the reason that the provisions of the Master Labor Agreement that "Workmen shall not be required to handle non-union materials" removed this type of duties from the course of employment, and hence there were no violations of the Act. [R. 26-28.]

Reasons for Granting This Petition.

The question presented by this petition has not been decided by this court.

The instant decision of the Ninth Circuit conflicts with the decision of the Second Circuit in *Rabouin, d.b.a. Conway Express v. N.L.R.B.*, 195 F. 2d 906, 912.

Prior to the decision in this case the Board had uniformly held that where an employer had bound himself by the collective bargaining process not to require his employees to work on non-union materials the execution of such a provision did not amount to a violation of the secondary boycott proscription of the statute. In this the Board was strongly supported by the decision of the Second Circuit in *Conway Express v. N.L.R.B.*, 195 F. 2d 906, 912. In that case a collective contract had, in like manner, removed from the employment area any requirement to work on non-union goods. Charged by Conway of 8(b)(4)(A) violations (on which the Board had ruled against Conway), that court said:

> "The Union cannot have committed an unfair labor practice under this section in regard to those employers who refused to handle (Conways) shipments under the terms of the area agreement provision re-

lating to cargo shipped by struck employees. Consent in advance to honor a hot cargo clause is not the product of the unions' forcing or requiring any employer . . . to cease doing business with any other person.'

"Of course, the direct strike against petitioner himself is not a secondary boycott. The distinction between the primary and secondary employer for the purpose of the section is now well recognized."

In the Board Decision here four members hold that where an employer, at the request of a union agrees to boycott the goods of another employer there is no violation of Section 8(b)(4)(A) because there has been neither a strike nor inducement or encouragement of employees to engage in such conduct. Say these four members, "what an employer may be induced to agree to do at the time the boycott is requested, he may be induced to agree in advance to do by executing a contract containing a 'hot cargo'" clause. The fifth member would hold such clause void. But at this point the members part company. Two members say that while such a contract is not against public policy and otherwise valid, the union may not approach the employees of the contracting employer and in accordance with the contract provisions induce those employees to observe the hot cargo provisions without engaging in a violation of the section of the statute here considered. Two other members hold that such a construction is destructive of the collective bargaining benefits and that it does not amount to a violation when the union agents inform the employees, for whose benefit the collective part is executed, of the hot cargo provisions or attempts to have such employees abide by the rule thus established.

We submit that the dissenting opinion of member Murdock is the only logical and proper decision that can be reached in this case and we adopt by reference all of the arguments against the validity of the order which he presents.

We agree that it is illogical to conclude, as two members of the Board do, that it is legal and proper to adopt a hot cargo provision in a collective bargaining contract but that a union party to such agreement is barred by the statute from acquainting the employees benefited by the collective contract of the provision and requesting or commanding that such employees obey those provisions. The members who so held do not quarrel with the propriety of the union exerting pressure against the contracting employer to reach the same results. That, they say is permissible. But if the union tells its members about the provision and that results in the provisions of the contract being carried out, then the union has contravened the statute. This conclusion has been rejected by the United States Supreme Court. (See *Assoc. of Westinghouse Employees v. Westinghouse Corp.*, 348 U. S. 437.)

The instant case is one of three currently in the Circuit Courts.

The *American Iron and Machine Works* cases, Nos. 13394 and 13406, in the District of Columbia Circuit, were argued there on January 11, 1957. These cases involving the activities of Local 886, General Drivers, and Local 850, Machinists, with this employer, present the same questions as the instant case, to-wit, the hot cargo clause and communications under it by the unions to the employees. By telephone advices we learn that today, May

9, 1957, the District of Columbia Circuit decided these cases in conformance with our contentions here.

The *General Millwork Corporation* case in the Sixth Circuit was decided there on April 10, 1957, adversely to our contentions. (*N.L.R.B. v. Local 11, U. B. of C. & J. of A.*, 39 L. R: R. M. 2731, 242 F. 2d .....)

Conclusion.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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ARTHUR GARRETT,
Of Counsel.

APPENDIX "A."

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

National Labor Relations Board, Petitioner, vs. Local 1976, United Brotherhood of Carpenters and Joiners of America, AFL, and Los Angeles County District Council of Carpenters and Nathan Fleisher, Respondents. No. 15,026.

Feb. 12, 1957.

Petition for Enforcement of Order of the National Labor Relations Board.

Before HEALY, LEMMON, and FEE, Circuit Judges.

LEMMON, Circuit Judge.

While the National Labor Relations Act, hereinafter referred to as the Act, has been termed in "its inception a novel experiment", which "has remained a controversial piece of legislation",[1] its provisions dealing with secondary boycotts—at least insofar as they are applicable to the instant case—seem to us to be tolerably clear and eminently fair.

1. *Statement of the Case*

The Sand Door and Plywood Company, of Los Angeles, California hereinafter Sand, on August 25, 1954, filed a charge against the respondents, hereinafter the Union, alleging that the latter had engaged in unfair labor practices within the meaning of 29 USCA §158(b)(4)(A).

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[1] Proposals for Modification of Unfair Labor Practice Procedures Under the NLRA, Stanford Law Review, December, 1956, Vol. 9, No. 1, pp. 155 et seq.

On September 24, 1954, the General Counsel of the National Labor Relations Board, hereinafter the Board, before which the charge had been filed, presented a complaint against the Union, which in substance alleged that the Union, "since on or about August 17, 1954, . . . [had] instructed the employees of Havstad & Jensen" at a certain college to be detailed hereinafter, and the employees of other employers, "to refuse to install Paine Rezo doors [infra] because [the Union's] rules and by-laws prohibit the installation of products not bearing the union label," etc. It was further alleged that by such conduct the Union had "engaged in, and . . . induced and encouraged the employees of Havstad & Jensen and of other employers to engage in, strikes or concerted refusals in the course of their employment to use, manufacture, [etc.] . . . goods, articles, [etc.] . . . or to perform services."

The complaint also averred that an object of the Union's "acts and conduct . . . is to force or require Havstad & Jensen, Watson and Dreps [infra] and other employers or persons to cease using, [etc.] or otherwise dealing in the products of Sand and Paine and to cease doing business with Sand and Paine."

By the above acts, the complaint continued, the Union was engaging in unfair labor practices within §158(b)(4)(A).

The Union's answer denied the commission of the unfair labor practices alleged, and affirmatively averred that "the Board lacked jurisdiction over the subject matter of the complaint or of the persons of the respondents."

On October 15, 1954, Sand filed a "First Amended Charge", and on the same day the Board filed an "Amendment to Complaint", neither of which materially altered their respective original allegations.

On December 13, 1954, the Trial Examiner filed an "Intermediate Report and Recommended Order", in which it was "recommended that the complaint be dismissed in its entirety".

On August 26, 1955, the Board handed down a "Decision and Order" holding that "By inducing and encouraging employees of Havstad and Jensen to engage in a strike or concerted refusal in the course of their employment to handle or install doors manufactured by Paine Lumber company [hereafter Paine], an object thereof being to force and require Havstad and Jensen to cease using, handling or otherwise dealing in the products of Paine . . . and to force or require Sand . . . to cease doing business with Paine . . ., the [Union has] engaged in and [is] engaging in unfair labor practices within the meaning of Section 8(b)(4)(A) of the Act". 113 NLRB 1210, No. 123.

The Decision and Order were signed by two members of the Board, including the chairman, and was specially concurred in by a third member. Two members dissented.

On February 3, 1956, the Board filed in this Court a petition for enforcement of the Board's order. It is that petition which we are here considering.

2. *Statement of Facts*

Havstad and Jensen, joint venturers, were engaged in the construction of a hospital and other buildings on the campus of the College of Medical Evangelists, a medical

school and nurses' training school owned and operated by the Seventh Day Adventists in Los Angeles.

Doors for the hospital, which was known as the White Memorial Hospital, were manufactured by Paine, and were purchased by Sand, a wholesale jobber and exclusive agent for Paine in Southern California. Sand sold the doors to Watson & Dreps, mill work contractors, with delivery between August 14, 1954, and August 17, 1954. Although counsel for the Union claims that "The record does not show what Watson & Dreps did with these doors"; there is testimony that delivery of the doors to the job, where Haystad & Jensen were in charge, commenced on the Friday before August 17, and that on August 17, a member of the firm of Watson & Dreps informed James C. Barron, vice president and general manager of Sand, that Emmett R. Jensen, one of the joint venturers with Larry C. Havstad, had reported "that the carpenters on the job had refused to handle the doors because the doors did not have a union label." This testimony provides a sufficient link between Watson and Dreps and Haystad & Jensen, as regards the doors.

Between 10 and 11 o'clock in the forenoon of August 17, 1954, Arnold Steinert, carpenter foreman of Havstad & Jensen, was told by Nathan Fleisher, business agent of Local 1976, one of the respondents herein, that "we'd have to quit hanging the doors until they got it settled that they were union or non-union doors, and they were going to check on 'em and in a day of two they would be cleared and then we could go ahead and go to work . . . . he said they were non-union doors, and they didn't have a label and we'd have to quit hanging the doors until it was settled."

Earlier in the morning, Steinert had assigned laborers "to move the doors from floor to floor, the doors that went on each floor." He had also assigned Sam Agronovich, a carpenter, to start hanging doors. When Steinert received the order from Fleisher "to quit hanging the doors," he proceeded to carry out the mandate:

"Well, the laborers were moving the doors from floor to floor so I told them to leave them alone, leave 'em set and we went down into the basement where Sam Agronovich was working and told him we'd have to quit hanging the doors because they weren't union until they got it settled."

Fleisher was present when Steinert talked to Agronovich.

When James Layton Nicholson, Havstad & Jensen's general superintendent of construction on the White Memorial Hospital project, arrived at his office that same morning, he was informed by the firm's secretary that "Fleisher had been on the job and had called the carpenters off from hanging the doors." Nicholson went to the jobsite and "observed that the laborers that [were] supposed to be placing the doors were not working at the time." When he asked the laborers for the reason, "All they said is that the union stopped them from hanging the doors, . . . and they [were] waiting for my foreman to replace them, or, in other words, give them other duties. . . ."

Nicholson found Fleisher, who was also at the building site, and asked him why he had stopped the men from hanging the doors. The following conversation, according to Nicholson, ensued:

"He says he had orders from the District Council that morning to stop them from hanging the doors until they could establish the fact whether they were union or non-union made doors. He says, 'I could have pulled them off yesterday but I waited until today.' And I told him at the time that, well, I says that I always thought I should have notice before, anybody could be pulled off, and he says, 'Well, those are my orders,' so he says 'We will have to stop hanging the doors until they get cleared by the union'."

At that juncture, Sam Agronovich and Saul Agronovich, the latter being the steward and also a carpenter, came up. Superintendent Nicholson at first told them that "if we can't hang the doors they might as well pick up their tools." Later Nicholson reconsidered the matter and told Steinert "to relocate the men and in such a way they could keep on working."

On that day and the next, James C. Barron, the Sand executive, supra, got into touch by telephone with Earl Thomas, of the Los Angeles County District Council of Carpenters. In a second conversation Thomas informed Barron that he had received a telegram from a union officer in Wisconsin, informing him that "the doors were not union made and that Paine . . . . did not belong to any union." According to Barron, the following conversation then ensued:

"I replied to him that—'Well, what are we going to do here, because the doors are here, and we are an innocent bystander? We are union and Watson & Dreps are union and the contractors are union, even the people that hauled the doors out here on the train were union people.' He

said: 'Well, . . . under the circumstances, we can't hang non-union doors,' but he said to me, 'Why don't you buy union doors?' "

Barron also talked to Fleisher, who told him "that the doors don't have a union label, and they have to be cleared before I can permit them to be hung."

Jensen, of Havstad & Jensen, also talked to Thomas, who told him that he had found out that Paine "was not a union operation," and "that the carpenters would not be able to handle those doors."

On Tuesday, October 5, 1954, after Sand had filed the instant charges and the Board had sought a temporary restraining order, Superintendent Nicholson, who was himself "a union man," and Steinert asked each carpenter, separately, whether he "would be willing to hang the doors," and from each there was received a negative reply, though some of the carpenters qualified their answers by saying that they would hang the doors if they "could get clearance" on them, or if the doors "were released."

The "By-Laws and Trade Rules" of the District Council of Carpenters of the United Brotherhood of Carpenters of America, of which Steinert was a member, provided that "Only members of the . . . Brotherhood . . . shall be permitted to do carpenter work on any job," and that "No member shall use, handle, install or erect any material produced or manufactured from wood that is not produced and manufactured by members of the . . . Brotherhood. . . . "

Similarly, the "Labor Agreement Between Southern California General Contractors and United Brotherhood

of Carpenters and Joiners of America," hereinafter "Labor Agreement," contains the following provision:

"Workmen shall not be required to handle non-union material."

The crucial question in this connection is whether such a provision justifies *a work stoppage* by the employees.

3. *The Applicable Statute*

§158. Unfair labor practices.

* * *

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; . . ."

4. *The Board's Assertion of Jurisdiction was Proper*

Before the trial examiner, it was stipulated that in 1953, Sand received from Paine, the headquarters of which was at Oshkosh, Wisconsin, materials, including doors, valued at $185,796.84. From January 1, 1954, to September 8, 1954, inclusive, Sand received from Paine,

materials, including doors, valued at $103,503.05. The doors in controversy are valued at $9,148.32. Sand received the doors between August 10 and August 14, 1954, and notified Watson & Dreps, the buyers, who took delivery at Sand's warehouse during the period between August 14 and August 17. We have already traced the delivery of the doors from Watson & Dreps to Havstad & Jensen.

In other words, Paine, whose products were the real target of the Union's actions, shipped materials valued at more than $100,000 from its Wisconsin plant to Sand, its Southern California distributor, during the first nine months of 1954, the crucial period here.

The Union, by refusing to use the doors on the Havstad & Jensen hospital job in Los Angeles, thereby interfered with more than a so-called *de minimis* flow of shipments into California. This is sufficient to bring the Union's obstructionist activities within the Board's legal jurisdiction.

In National Labor Relations Board v. Denver Building & Construction Trades Council, 1951, 341 U. S. 675, 683-684, the Board had found that the activities complained of had had a sufficient impact upon interstate commerce to sustain its jurisdiction, and the Court of Appeals was satisfied. The Supreme Court commented that "We see no justification for reversing that conclusion," and added:

"The Board found that, in 1947, Gould & Preisner purchased $86,560.30 of raw materials, of which $55,745.25, or about 65% were purchased outside of Colorado. Also, much of the merchandise it purchased in Colorado had been produced outside of that State. While Gould & Preisner performed no services outside of Colorado, it

shipped $5,000 of its products outside of that State. Up to the time when its services were discontinued on the instant project, it had expended on it about $315 for labor and about $350 for materials. On a 65% basis, $225 of those materials would be from out of the State. The Board adopted its examiner's finding that any widespread application of the practices here charged might well result in substantially decreasing the influx of materials into Colorado from outside the State and it recognized that Gould & Preisner's annual purchase of over $55,000 of such materials was not negligible.

"The Board also adopted the finding that the activities complained of had a close, intimate and substantial relation to trade, traffic and commerce among the states and that they tended to lead, and had led, to labor disputes burdening and obstructing commerce and the free flow of commerce. *The fact that the instant building, after its completion, might be used only for local purposes does not alter the fact that its construction, as distinguished from its later use, affected interstate commerce.*" [Emphasis supplied.][2]

It is immaterial, so far as the Board's legal jurisdiction is concerned, that Havstad & Jensen obtained the doors from Paine from an intermediary in California—Watson & Dreps—rather than by direct shipment from out of the State. See National Labor Relations Board v. Cowell Portland Cement Co., 9 Cir., 1945, 148 F. 2d 237, 242, certiorari denied, 1945, 326 U. S. 735; National Labor Relations Board v. Townsend, 9 Cir., 1950, 185 F. 2d 378, 382-383, certiorari denied, 1951, 341 U. S. 909.

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[2]See also Local 74, United Brotherhood of Carpenters & Joiners of America v. National Labor Relations Board, 1951, 341 U. S. 707, 712.

We agree with the Board that the Trial Examiner erroneously designated Havstad & Jensen as the primary employer, in considering whether jurisdiction was to be asserted. Havstad & Jensen was a neutral employer whose carpenters were unlawfully induced by Fleisher, via Steinert, to refuse to install the doors in question. Paine was the primary employer, for it was *Paine's* products to which the Union objected. Havstad & Jensen was the *secondary* employer.

It is clear, then, that the dispute had a sufficient impact upon commerce to be subject to the Board's jurisdiction as a matter of law. We next address ourselves to the question of whether the Board should have *assumed* jurisdiction in the instant case. In other words, does the present controversy meet what the Union terms the Board's "monetary" standards?

In Jonesboro Grain Drying Co-operative, Case No. 32-RC-693, 110 NLRB 481, 483, No. 67, decided on October 26, 1954, the Board announced, *inter alia*, the following jurisdictional standard:

"Accordingly, we have determined that in future cases the Board will assert jurisdiction over enterprises which annually meet *one or more* of the following standards:

* * *

"(2) *Direct outflow standard:*

An enterprise which produces or handles goods and ships such goods out of State, or performs services outside the State in which the enterprise is located, valued at $50,000 or more." [Emphasis supplied.]

In Truck Drivers Local Union No. 649 (Jamestown Builders Exchange), Case No. 3-CC-19, 93 NLRB 386,

387, No. 51, decided on February 23, 1951, the Board said:

"By its very nature the effect of a secondary boycott extends beyond the operations of the primary employer with which the union is engaged in a dispute, and reaches the secondary employers whom the Union is attempting to force or require to cease dealing with the primary employer by means prescribed [*sic*] in Section 8(b)(4) [29 USCA §158(b)(4), *supra*]."

Chief Judge Clark, in National Labor Relations Board v. Associated Musicians, etc., 2 Cir., 1955, 226 F. 2d 900, 907, certiorari denied, 1956, 351 U. S. 962, commented:

"In any event it is doubtful under the Act whether coverage of the secondary employer need be established independent of coverage of the primary employer. . . . We think the better view is that the secondary activity is but an extension of the labor dispute with the primary employer and that the business of both employers are to be considered in determining jurisdiction of the secondary activity. The opposite conclusion would require the fragmenting of the authority of the Board over labor disputes —a result which, lacking specific legislative command, we should shun. [Citing *Jamestown Builders Exchange, supra*, and McAllister Transfer case, *infra*.]"[3]

Finally, as Judge Mathews observed in National Labor Relations Board v. Stoller, 9 Cir., 1953, 207 F. 2d 305, 307, certiorari denied, 1954, 347 U. S. 919, "The general rule is that; where the Board has jurisdiction, as it had

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[3]See also Joliet Contractors Ass'n v. National Labor Relations Board, 7 Cir., 1952, 193 F. 2d 833, 840.

in this case, whether such jurisdiction, should be exercised is for the Board, not the courts, to determine."

The Board's assertion of jurisdiction in the instant case was proper.

5. *The Board Was Correct in Finding That the Union Violated the Act by Inducing Employees of Havstad & Jensen to Refuse to Install Paine Doors*

As we have seen, the evidence shows that there is no serious question that Steinert, following Fleisher's instructions, caused employees of Havstad & Jensen to engage in a concerted work stoppage for the object forbidden by Section 8(b)(4)(A).

The union contends that "If this idleness can be termed a work stoppage, it is clear that the cessation did not originate with the employees but was a direct result of managerial orders." It is also urged that "Havstad & Jensen were parties to and bound by a collective bargaining agreement whereby they had previously agreed not to require 'workmen to handle non-union materials'."

In our view, there was inducement to a concerted refusal in the statutory sense, not authorized by the contract between Havstad & Jensen and the Union. An employer may well remain free to decide, as a matter of business policy, whether he will accede to a union's boycott demands, or, if he has already agreed to do so, whether he will fulfill his agreement. An entirely different situation, however, is presented under §8(b)(4)(A) of the Act (29 USCA §158(b)(4)(A), supra), when it is sought to influence the employer's decision by a work stoppage of his employees. Such a work stoppage, Congress has plainly declared, is unlawful, when the object—

clearly present here—"is . . . forcing or requiring any employer . . . to cease using . . . the products of any other . . . manufacturer, or to cease doing business with any other person."

In the instant case, we have seen that, despite the "hot cargo" provision in the contract, *supra*, the employees had actually been handling Paine doors. They ceased doing so only upon Fleisher's and Steiner's orders. Those orders, we think, were in direct contravention of the mandate.

In National Labor Relations Board v. Washington-Oregon Shingle Weavers' Dist. Council, 9 Cir., 1954, 211 F. 2d 149, 152, we said:

"The prohibited object of the boycott is stated by the statute to be 'forcing * * * any employer or other person to cease using * * * the products of any other producer, processor, or manufacturer * * *.' In fact, if the object is sought, not because of any dispute, but merely because the union dislikes the other producer for any reason, or for no reason, the conduct would appear even more reprehensible. * * * The only dispute between the Union and the Company was over the latter's use of unfair shingles, and had no bearing on wages, working conditions, etc. In such a case, a strike called by the Union can have no other purpose than to compel the Company to cease using what the Union considers unfair shingles.

"Furthermore, the legislative history of the Act [*infra*] clearly shows that Congress intended to proscribe exactly the type of union action involved here."

In General Drivers, etc., and American Iron and Machine Works Company, No. 121, 115 NLRB 800, 801, decided on March 15, 1956, the Board said:

"1. We find, as did the Trial Examiner, that Respondent Teamsters, by its inducement of Employees of the common carriers (secondary employers) to engage in a concerted refusal in the course of their employment to handle freight brought by American Iron and Machine Works Company (the primary employer) to the carriers' docks, with an object of forcing or requiring the carriers to cease doing business with American Iron, violated Section 8(b)(4)(A) of the Act.

"Like the Trial Examiner, we reject the contention of Teamsters that its conduct was excused by the 'hot cargo' clause in the Teamsters' contracts with the common carriers. This clause provided that members of Teamsters 'shall not be allowed to handle or haul freight to or from an unfair company.' However, in rejecting this defense, we do not rely, as did the Trial Examiner on [McAllister Transfer, Inc., 110 NLRB 1769], but rather on the more recent Board decision in [Sand Door and Plywood Co., 113 NLRB 1210, No. 123, decided August 26, 1955][4] which was decided after the issuance of the Intermediate Report in the case at bar. As stated in the principal opinion in that case, regardless of the existence of a 'hot cargo' clause, any direct appeal to employees by a union to engage in a strike or concerted refusal to handle a product is proscribed by the Act when one of the objectives set forth in Section 8(b)(4)(A) is present. Thus, while Section 8(b)(4)(A) does not forbid the execution of a hot cargo clause or a union's enforcement thereof by appeals to the *employer* to honor his contract, the Act does, in our opinion, preclude enforcement of such clause by appeals to employees,

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[4]—the instant case.

and this is so whether or not the employer acquiesces in the union's demand that the employees refuse to handle the 'hot' goods." [Emphasis supplied.]

Similarly, in International Brotherhood of Teamsters, etc., and McAllister Transfer, Inc., 110 NLRB 1769, No. 224, supra, decided on December 16, 1954, the Board used the following language:

"We are concerned here with clauses in collective-bargaining agreements, commonly known as 'hot cargo' clauses, which provide that the Union and employees may refuse to handle goods designated as 'unfair' and that such refusal shall not be deemed a violation of the contract or cause for discharge. . . . The Respondents in the instant case, as part of their efforts to force McAllister's employees to join their locals, determined that McAllister freight was 'unfair'. The Respondents thereupon engaged in a boycott of McAllister freight through other common carriers, . . . with which they had contracts containing so-called 'hot cargo' clauses. . . . .

"Essentially, then, the basic question, as we see it, is whether these ['hot cargo'] clauses constitute a meritorious defense to the complaint which alleges violations of Section 8(b)(4)(A) and (B).

"In enacting these provisions of the Act, it is clear that Congress declared a public policy against *all* secondary boycotts, without distinction as to type or kind.

"As the late Senator Taft stated in the course of the legislative debate: . . .

"'The Senator will find a great many decisions . . . which hold that under the common law a secondary boycott is unlawful. Subsequently, under the provisions of the Norris-LaGuardia Act, it became impossible to stop a secondary boycott or any other kind of a strike, no

matter how unlawful it may have been at common law. All this provision of the bill does is to reverse the effect of the law as to secondary boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have broadened the provisions dealing with secondary boycotts as to make them an unfair labor practice.' 93 Cong. Rec. 4323.

"More specifically, Senate Report No. 105 on S. 1126 stated:

"Because of the nature of certain of these practices, especially jurisdictional disputes and *secondary boycotts* and strikes for specifically defined objectives, the committee is convinced that additional procedures must be made available under the National Labor Relations Act *in order adequately to protect the public welfare which is inextricably involved in labor disputes.*

"Hence, we have provided that the Board, *acting in the public interest and not in vindication of purely private rights*, may seek injunctive relief in the case of all types of unfair labor practices and that it shall also seek such relief in the case of strikes and *boycotts* defined as 'unfair labor practices.' [Emphasis added by the Board.]

"We deem it significant that Congress spoke in unmistakable terms of the protection of 'the public welfare which is inextricably involved' in such disputes, and pointedly characterized the Board as 'acting in the public interest and not in vindication of purely private rights'. It is of course, a necessary concomitant of the protection of the public welfare that protection is also extended to employees and employers as well. But it is only fair to say that such protection to private interests was in no way intended by Congress to detract from the public in-

terest that constitutes the very foundation of the policies implicit in these statutory enactments. It has by this time become axiomatic that the exclusive grant of authority to the Board to prevent unfair labor practices affecting commerce was to insure that the existence of some private agreements at odds with the statute does not preclude the Board from acting in the public interest. . . .

* * *

". . . we necessarily feel constrained to pass on the validity of the 'hot cargo' clauses offered as a defense for the Respondent's conduct, and to make the unequivocal finding that such clauses are contrary to public policy and cannot therefore serve as a defense."

As was observed by Judge Bratton in National Labor Relations Board v. United Brotherhood of Carpenters and Joiners, etc., 10 Cir., 1950, 184 F. 2d 60, 64, certiorari denied, 1951, 341 U.S. 947, "The basic purpose and objective of the section of the Act is to prohibit the involvement of employers in labor disputes of other employers with whom they are doing business."

Finally, we consider the Union's argument that the work stoppage "was a direct result of managerial orders". That contention is based upon the theory that Steinert, the foreman, "acted solely as a representative of management when he instructed employees to cease their work on the doors".

Steinert was a member of Local 563 of the Union. The By-Laws and Trade Rules of the Los Angeles County District Council of Carpenters required that he belong to the Union, and that he should hire no non-union members. As foreman, he and the steward were "equally responsible for the enforcement of all By-Laws and Trade

Rules," etc. Violators of that rule were "subject to a fine of $100.00 and/or expulsion."

Therefore, when Fleisher ordered Steinert to stop work on the doors because they were non-union, it is logical to assume that he was invoking Steinert's obligations under the Union's rules. Cf. National Labor Relations Board v. Cement Masons Local No. 555, 9 Cir., 1955, 225 F. 2d 168, 173-174, and cases there cited.

The fact that in some respects foremen, as has been said of buyers, "may also be agents of employers does not eliminate them from the scope of" §158(b)(4)(A). Amalgamated Meat Cutters, etc. v. National Labor Relations Board, CA D.C., 1956, 237 F. 2d 20, 23.

The Union seeks to brush aside the force of its own rules by quoting the closing clause of Article XIII of the "Labor Agreement Between Southern California General Contractors and United Brotherhood of Carpenters and Joiners of America," which reads as follows:

". . . that any provision in the working rules of the Unions, with reference to the relations between the Contractors and their employees, in conflict with the terms of this Agreement shall be deemed to be waived and any such rules or regulations which may hereafter be adopted by the Unions shall have no application to the work hereunder."

The above rule is not applicable here. We are not now concerned with Steinert's "relations" to "the contractors," but with his "relations" to his Union and his status and obligations therein. No contract with his employers could interfere with those relations, so long as he remained a member of the Union, which he indubitably was. So long as he remained a member, he was bound by the

Union rules governing his relations to the Union. The proposition is so plain as to require no further elaboration.

Nor could Steinert "waive" the Union's power to fine him $100 for violating the subsection of the "By-Laws and Trade Rules" holding him jointly responsible with the steward for their enforcement!

We hold that the Board was correct in holding that the Union, through its foreman Steinert and its business agent Fleisher, violated §158(b)(4)(A) by ordering employees of Havstad and Jensen to refuse to install Paine doors.

6. *Conclusion*

Accordingly, we hold that the Board's assertion of jurisdiction was proper, and that it was correct in finding that the Union violated the Act by ordering employees of Havstad & Jensen to refuse to install doors that had been manufactured by Paine.

A decree should issue enforcing the Board's order in full.

(Endorsed:) Opinion. Filed Feb. 12, 1957.

Paul P. O'Brien, Clerk.

APPENDIX "B."

United States of America

Before the National Labor Relations Board

Case No. 21-CC-189

Local 1976, United Brotherhood of Carpenters and Joiners of America, AFL, its agent, Nathan Fleisher, and Los Angeles County District Council of Carpenters[1] and Sand Door and Plywood Co.

Decision and Order

On December 13, 1954, Trial Examiner Wallace E. Royster issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had not engaged in and were not engaging in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, exceptions, and briefs were filed by the General Counsel, the charging party, and the Respondents, and a brief amicus was filed by the Chamber of Commerce of the United States. Pursuant to notice, oral argument was held on July 7, 1955, before the Board at Washington, D. C., in which the General Counsel, the charging party, and the Respondents participated.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, the oral argument, and the entire

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[1]The name of the District Council appears as amended at the hearing.

record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner only insofar as they are consistent with this Decision and order.

1. The Respondents except to the Trial Examiner's recommendation that jurisdiction should be asserted herein. The complaint alleges that the Respondents induced and encouraged employees of Havstad and Jensen and of other employers to engage in concerted refusals to install nonunion doors manufactured by Paine Lumber Company,[2] and supplied by Sand Door and Plywood Co.,[3] the charging party, to Havstad and Jensen,[4] with an object of forcing or requiring Havstad and Jensen, Watson and Dreps, and other employers to cease using or otherwise dealing in the products of Paine and Sand and to cease doing business with Paine and Sand, thereby violating Section 8 (b) (4) (A) of the Act.

In the Jamestown Builders Exchange case,[5] the Board set forth the rule which it has since followed[6] for determining whether to assert jurisdiction in cases involved

[2]Hereinafter referred to as Paine.

[3]Hereinafter referred to as Sand.

[4]The doors in question were shipped by Paine from its Wisconsin plant directly to Sand, the exclusive distributor of Paine doors in Southern California, and were sold by Sand to Watson & Dreps, a building materials retailer, which, in turn, sold the doors to Havstad and Jensen, who were engaged in building a hospital as joint venturers.

[5]Truck Drivers Local Union No. 649, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL (Jamestown Builders Exchange, Inc.), 93 NLRB 380.

[6]See International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 554, et al. (McAllister Transfer, Inc.), 110 NLRB 1769, hereinafter referred to as McAllister Transfer, Inc.

alleged secondary boycotts in violation of Section 8 (b) (4) (A). This rule provides that if the operations of the primary employer alone satisfy the Board's jurisdictional standards, jurisdiction is to be asserted without further inquiry. Otherwise, operations of secondary employers are also to be considered to the extent that they are affected by the alleged unlawful conduct.[7]

We agree with the General Counsel that the Trial Examiner erroneously designated Havstad and Jensen as the primary employer in this case in considering whether jurisdiction was to be asserted. As hereinafter found, Havstad and Jensen was a neutral employer whose employees were unlawfully induced or encouraged to refuse to install the doors in question. As such, Havstad and Jensen is a secondary employer within the meaning which we customarily attach to that term. Furthermore, we agree with the General Counsel that Paine is a primary employer within the meaning of the Jamestown jurisdictional rule. Thus, the violation found herein is similar to that involved in the Sound Shingle Co.[8] case. As in that case, the Respondents seek, by proscribed means, to force or require an employer to stop handling the nonunion product of another manufacturer although no active dispute exists between the nonunion manufacturer and the Respondents. The Board there held that such conduct "constitutes a secondary boycott of the type which Section 8 (b) (4) (A) was intended to proscribe." Implicit

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[7] As to the interpretation of this rule as it applies to operations of secondary employers, see McAllister Transfer, Inc., supra.

[8] Washington-Oregon Shingle Weavers' District Council et al (Sound Shingle Co.), 101 NLRB 1159, Member Murdock dissenting. Enforced, 211 F. 2d 946 (C. A. 9, 1954). Hereinafter referred to as Sound Shingle Co.

in that finding was the further finding that the manufacturer of the nonunion product was in the position of a primary employer. And although there was an active primary dispute with the primary employer in the Jamestown case, we perceive no reason to restrict the use of the term primary employer as used in that case to employers with whom the union involved has an active primary dispute. Accordingly, we find that Paine's annual direct outflow of materials from Wisconsin, being in excess of $100,000, is sufficient to warrant the assertion of jurisdiction in this case.[9]

2. The Respondents contend that, on the record in this case, the Board should find that the Respondents did not induce or encourage employees of Havstad and Jensen to engage in a strike or concerted refusal to install the Paine doors, and that the Trial Examiner's contrary findings should be reversed. On the other hand, the General Counsel and the charging party each contend that the record discloses incidents of inducement or encouragement in addition to those found by the Trial Examiner. In particular, the General Counsel contends that Foreman Steinert's instructions to carpenter Agronovich and several laborers, hereinafter referred to, constitute proscribed inducement and encouragement attributable to the Respondents. We find merit in this contention.

As the Trial Examiner found, on the morning of August 17, 1954, Fleisher, the Respondent Local's business agent, approached Steinert, Havstad and Jensen's foreman, at the building site, and told Steinert to stop

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[9] Jonesboro Grain Drying Cooperative, 110 NLRB 481. It is therefore unnecessary to consider other arguments advanced by the General Counsel for asserting jurisdiction in this case.

hanging the Paine doors until it could be determined whether they were union or nonunion. Steinert told several laborers, who were under his supervision and then engaged in distributing the doors to the locations where they were to be hung, to stop distributing the doors. Then, accompanied by Fleisher, Steinert went to the location where carpenter Agronovich was preparing to hang doors and told him to stop hanging the doors because they were not union-made. Steinert was a member of a constituent local of the Respondent District Council. Under its By-Laws and Trade Rules, Steinert was vested with the authority and responsibility to enforce the District Council's By-Laws and Trade Rules.[10] Among the rules was one barring union members from handling nonunion materials.[11]

It is true that as a foreman as well as union agent, Steinert's status at first glance appears equivocal. However, it is clear that Fleisher, who, as the Trial Examiner found, was an agent of both the Respondent District Council and the Respondent Local, approached Steinert not as a representative of management but as an instrumentality of the Respondents through whom the by-laws could be enforced. Thus, Fleisher did not ask Steinert to stop the door hanging, but, in Steinert's words, Fleisher "told me that we'd have to quit hanging the doors." (em-

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[10]Section 20 (f) of the By-Laws and Trade Rules provides: All foremen are to be held equally responsible (the same as the Steward) for the enforcement of all By-Laws and Trade Rules of the District Council. Violators of this paragraph shall be subject to a fine of $100.00 and/or expulsion.

[11]Section 16 (d) of the By-Laws and Trade Rules provides in part: No member shall use, handle, install or erect any material produced or manufactured from wood that is not produced and manufactured by members of the United Brotherhood of Carpenters and Joiners of America.

phasis added). Also, when, shortly thereafter, Superintendent Nicholson asked Fleisher why he stopped the men from hanging the doors, as credibly testified to by Nicholson, Fleisher replied that "he had orders from the District Council that morning to stop them from hanging the doors," that he "could have pulled them off yesterday but * * * waited until today." Significantly too, after giving his instructions to Steinert, Fleisher stood by to insure that Steinert passed these instructions on to employees. Furthermore, Fleisher did not approach Steinert to gain enforcement of their contract which the Respondents claim relieved the carpenters of the duty of installing the Paine doors, for at no time in his conversations with Steinert or Nicholson was the contract mentioned by Fleisher. We note in this connection that Steinert, as a foreman, was at the lowest level of management and not an official who would normally be approached as to matters of company policy and contract compliance. As there is, in addition, no indication of the extent of Steinert's authority to act for his employer, we conclude that Fleisher approached Steinert in Steinert's capacity as agent of the Respondent District Council and that Steinert acted in such capacity in ordering the laborers and carpenter Agronovich to stop handling the doors, thereby inducing or encouraging them to engage in a concerted refusal to handle the Paine doors.[12] We further conclude that Steinert's conduct is attributable to the Respondent Local because Steinert acted pursuant to the orders of Fleisher, who was the business agent of the Respondent Local.

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[12]In view of this finding, we need not determine whether there was any other incident constituting such inducement or encouragement.

3. We find no merit in the Respondents' contention that, even assuming that there was inducement and encouragement of a concerted refusal to hang the doors, it was not for an object proscribed by the Act. In effect, the Respondents contend that their activity was primary because its only objective was to require Havstad and Jensen to use union-made materials in accordance with their contract, hereinafter referred to, and because the Respondents had no active labor dispute with Paine. As indicated above, we regard our decision in Sound Shingle Co.,[13] as dispositive of this issue. Here, as there, a direct object of such inducement was to force or require the secondary employer to cease using or handling the product of the primary employer, another manufacturer. We held that such a product boycott is proscribed by the Act, even in the absence of an active dispute over specific demands with the manufacturer of a nonunion product. As it is clear, under Board precedents, that, in order to find a violation of Section 8 (b) (4) (A), the object proscribed by the Act need not be the sole object of the conduct under scrutiny,[14] we conclude that the proscribed object necessary to a finding of a violation exists in this case.

Moreover, we are of the opinion that the record establishes the existence of another object of the Respondents' conduct which falls within the interdiction of Section 8 (b) (4) (A). Thus, when Barron of Sand Door called Thomas, the secretary-treasurer of the District Council,

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[13]Supra.

[14]Los Angeles Building and Construction Trades Council, AFL, (Standard Oil Co.), 105 NLRB 868 at 870, and cases cited therein; Wood, Wire and Metal Lathers International Union, Local No. 234, AFL (Acousti Engineering Company), 97 NLRB 574.

for information about the District Council's position with respect to the Paine doors, Thomas stated that clearance might be obtained for the doors purchased by Havstad and Jensen, as well as Sand Door's floor stock and special orders, if Sand's stock orders were cancelled and no further orders were placed with Paine. From this conversation, it is clear that a further objective of the Respondents' conduct was to force or require Sand Door to cease doing business with Paine. Under Section 8 (b) (4) (A), "forcing or requiring * * * any employer or other person * * * to cease doing business with any other person" (emphasis added) is proscribed when means made unlawful by that Section are employed. Thus, it is not necessary that the employer or person whom the labor organization seeks to force to cease doing business with another person be the employer of the employees who have been induced or encouraged to engage in a work stoppage for that purpose. Accordingly, we find that an additional object of the Respondents' conduct, proscribed by the Act, was to force or require Sand to cease doing business with Paine.

4. The final issue which remains to be considered in this case is whether the Respondents' contract with Havstad and Jensen which provides, "Workmen shall not be required to handle nonunion material," removes the above-described conduct from the proscription of Section 8 (b) (4) (A) under the so-called Conway doctrine. In the Conway Express case,[15] shop stewards, at three establish-

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[15]International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 294, AF of L (Henry V. Rabouin, d/b/a Conway's Express), 87 NLRB 972, at 981-983, affirmed 195 F. 2d 906, (C.A. 2, 1952).

ments of secondary employers, upon advice from the respondent union in that case that a strike was "on," ceased handling freight of a struck primary employer. Each of the three secondary employers acquiesced in its employees' refusal to handle the "struck" goods. In addition, each of these 3 employers was a party to an agreement which reserved to the union the right to refuse to handle such goods. As the secondary employers had, in effect, consented in advance to boycott the "struck" employer, a majority of the Board concluded that the failure of their employees to handle the struck goods "was not in the literal sense a 'strike' or 'refusal' to work, nor was any such concerted insubordination contemplated by the Respondent when it caused the employees to exercise their contractual privilege." The Board rejected a contention that the contract clause relied on was repugnant to the policy of the Act and therefore invalid.

Subsequently, the problem of the effect of a substantially similar "hot cargo" clause arose in the Pittsburgh Plate Glass case.[16] In that case, again, the secondary employers affirmed their "hot cargo" contracts by acquiescing in their enforcement. The Board found no violation of Section 8 (b) (4) (A), relying on its Conway Express decision, and adding as a further ground that the refusal to handle "struck" freight was not "in the course of * * * employment," within the meaning of Section 8 (b) (4) (A), as the "hot cargo" clause in the contract excluded from required job duties work on such goods.

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[16]Chauffeurs, Teamsters, Warehousemen and Helpers Local Union No. 135 (Pittsburgh Plate Glass Company), 105 NLRB 740 at 743-745.

As in McAllister Transfer, Inc.[17] and Reilly Cartage Company,[18] the validity of these decisions is now challenged by the General Counsel, the Trial Examiner in the instant case having felt bound to follow them.

It is well settled that, where an employer, at the request of a union which refrains from the use of threats or direct appeals to his employees, voluntarily agrees to boycott the goods of another employer, there is no violation of Section 8 (b) (4) (A) because there has been neither a strike nor inducement or encouragement of employees to engage in such conduct.[19] What an employer may be induced to agree to do at the time the boycott is requested, he may be induced to agree in advance to do by executing a contract containing a "hot cargo" clause. Insofar as such contracts govern the relations of the parties thereto with each other, we do not regard it our province to declare them contrary to public policy. However, we do not agree that unions, which are parties to such contracts, may approach employees of the contracting employer and induce or encourage them to refuse to handle the goods of another employer with immunity from the sanctions of Section 8 (b) (4) (A). In our opinion, such conduct constitutes inducement or encouragement of employees to engage in a concerted refusal to handle goods for an object proscribed by Section 8 (b) (4) (A) no less than it

[17]McAllister Transfer, Inc., supra.

[18]Marie T. Reilly d/b/a Reilly Cartage Company, 110 NLRB 1742.

[19]Printing Specialities and Paper Converters Union, Local 388, AFL, (Sealright Pacific, Ltd), 82 NLRB 271, 272 at fn. 4; Lewis Karlton d/b/a Consolidated Frame Company, 91 NLRB 1295 at 1299; Local Union 878, International Brotherhood of Teamsters, e. a. (Arkansas Express, Inc.), 93 NLRB 255.

does in the absence of such agreement.[20] Such conduct is contrary to the express language of the Statute, and therefore cannot be validated by the existence of a contract containing a "hot cargo" clause. In enacting Section 8 (b) (4) (A), Congress intended to protect the public from strikes or concerted refusals interrupting the flow of commerce at points removed from primary labor-management disputes.[21]

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[20]This is essentially the view expressed by Chairman Farmer in his concurring opinion in the McAllister case, in which he said that if a contrary view were adopted" * * * the Board would place itself in the posture of championing boycott clauses and affirmatively enforcing them as between the parties. This is the inevitable result of giving the agreement crucial weight in evaluating the conduct of the parties, and refusing to find a violation solely because of the contract's existence in the face of other evidence which * * * clearly shows that all the essential statutory elements of an unlawful boycott are nevertheless present."

[21]The preamble of the Act, Section 1 (b), makes it clear that: * * * employers, employees, and labor organizations [should] * * * above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce * * * to proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce. (emphasis added)

With specific reference to Section 8 (b) (4) (A) the following excerpts appear in the legislative history.

Senate Report No. 105 on S. 1126, p. 8 (I Leg. Hist. 414) stated: Because of the nature of certain of these practices, especially jurisdictional disputes and secondary boycotts and strikes for specifically defined objectives, the committee is convinced that additional procedures must be made available under the National Labor Relations Act in order adequately to protect the public welfare which is inextricably involved in labor disputes.

* * * * *

Hence, we have provided that the Board, acting in the public interest and not in vindication of purely private rights, may seek injunctive relief in the case of all types of unfair labor practices

The Employer, but not the union, may instruct his employees to cease handling goods sought to be boycotted. Until the Employer instructs his employees that they need not handle the "unfair" product, a strike or concerted refusal to handle such goods constitutes "a strike or concerted refusal in the course of employment" to handle the goods within the meaning of Section 8 (b) (4) (A). In this connection, we disagree with the holding in the Pittsburgh Plate Glass case that the words, "* * *

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and that it shall also seek such relief in the case of strikes and boycotts defined as unfair labor practices. (Emphasis added)

Senator Taft stated in debate (93 Cong. Rec. 4323, April 29, 1947): Take a case in which the employer is getting along perfectly with his employees. They agree on wages. Wages and working conditions are satisfactory to both sides. Someone else says to those employees, 'We want you to strike against your employer because he happens to be handling some product which we do not like. We do not think it is made under proper conditions.' Of course if that sort of thing is encouraged there will be hundreds and thousands of strikes in the United States. There is no reason that I can see why we should make it lawful for persons to incite workers to strike when they are perfectly satisfied with their conditions. If their conditions are not satisfactory, then it is perfectly lawful to encourage them to strike. The Senator [Pepper] says they must be encouraged to strike because their employer happens to be doing business with someone the union does not like or with whom it is having trouble or having a strike. On that basis there can be a chain reaction that will tie up the entire United States in a series of sympathetic strikes, if we choose to call them that. (Emphasis added)

Representative Landis stated (93 Cong. Rec. A 1296, March 24, 1947): Secondary boycotts engaged in by labor unions to force a third party, not a party to a primary labor dispute, to force that party to cease using the products of the employer engaged in the primary dispute is an activity which should be made illegal. Secondary boycotts have had the effect of throwing a great many innocent people out of work. As a result of these secondary boycotts many of our citizens have been deprived of the deliveries of milk, bread, meat, fruits, vegetables, and other essentials of life. (Emphasis added)

in the course of employment," found in Section 8 (b) (4) (A) have a restrictive meaning. We are persuaded that Congress used this phrase only to distinguish between employees in their capacity as employees and employees in their capacity as consumers.

We hold that, regardless of the existence of a "hot cargo" clause, any direct appeal to employees by a union to engage in a strike or concerted refusal to handle a product is proscribed by the Act when one of the objectives set forth in Section 8 (b) (4) (A) is present. Accordingly, having found that such conduct occurred, for a proscribed object, we conclude that the Respondents violated Section 8 (b) (4) (A).[22]

The effect of the unfair labor practices on commerce.

The activities of the Respondents, set forth above, occurring in connection with the operations of Paine Lumber Company, Sand Door and Plywood Co., and other employers as described in the Intermediate Report attached hereto, have a close, intimate and substantial relation to trade, traffic and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

The Remedy

Having found that the Respondents violated Section 8 (b) (4) (A) of the Act, as set forth above, we shall order them to cease and desist from such conduct. We shall also order that the Respondents take certain affirmative action designed to effectuate the policies of the Act.

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[22] To the extent that the Board's decisions in Conway's Express, supra, and Pittsburgh Plate Glass Company, supra, are inconsistent with the majority holdings in this case, they are overruled.

Conclusions of Law

1. Local 1976, United Brotherhood of Carpenters and Joiners of America, AFL, and Los Angeles County District Council of Carpenters are labor organizations within the meaning of Section 2 (5) of the Act. Nathan Fleisher is business agent of Respondent Local 1976, and an agent of Respondent District Council within the meaning of the Act.

2. By inducing and encouraging employees of Havstad and Jensen to engage in a strike or concerted refusal in the course of their employment to handle or install doors manufactured by Paine Lumber Company, an object thereof being to force and require Havstad and Jensen to cease using, handling or otherwise dealing in the products of Paine Lumber Company and to force or require Sand Door and Plywood Company to cease doing business with Paine Lumber Company, the Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (b) (4) (A) of the Act.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

Order

Upon the entire record in this case and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, Local 1976, United Brotherhood of Carpenters and Joiners of America, AFL, and Los Angeles County District Council of Carpenters, and their officers, representatives, successors, assigns, and agents, including Respondent Nathan Fleisher, shall:

1. Cease and desist from inducing or encouraging the employees of Havstad and Jensen, or any other em-

ployer, to engage in a strike or concerted refusal in the course of their employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services for their employer, where an object thereof is to force or require Havstad and Jensen or any other employer or person to cease using, handling, or otherwise dealing in the products of Paine Lumber Company or any other nonunion manufacturer, or to force or require Sand Door and Plywood Co., or any other employer or person, to cease doing business with Paine Lumber Company or any other nonunion manufacturer.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Post at their Los Angeles, California, business offices, respectively, copies of the notice attached hereto as Appendix A.[23] Copies of said notice, to be furnished by the Regional Director for the Twenty-First Region, shall, after being duly signed by the official representatives of the Respondents, including Nathan Fleisher, be posted by the Respondents Local 1976 and District Council, immediately upon receipt thereof, and maintained by them for a period of sixty (60) consecutive days thereafter, in conspicuous places including all places where notices to members of said labor organizations are customarily posted.

Reasonable steps shall be taken by said Respondents to insure that said notices are not altered, defaced, or covered by any other material.

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[23] In the event this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted before the words, "A Decision and Order," the words, "A Decree of the United States Court of Appeals Enforcing."

(b) Notify the Regional Director for the Twenty-First Region in writing, within ten (10) days from the date of this Order, what steps the Respondents have taken to comply herewith.

Dated, August 26, 1955, Washington, D. C.

[Seal] GUY FARMER, Chairman

BOYD LEEDOM, Member

National Labor Relations Board

Philip Ray Rodgers, Member, concurring:

I am concurring in the result reached herein by Chairman Farmer and Member Leedom only because I am convinced that "hot cargo" clauses are contrary to public policy and cannot therefore serve as a defense to a complaint charging a violation of Section 8 (b) (4) (A) of the Act.

In my joint opinion with Member Beeson in McAllister Transfer Inc., supra, I stated that a careful reading of the legislative history and an analysis of the established principles of law lead to the inevitable conclusion that Section 8 (b) (4) (A) of the Act was specifically intended to protect the public interest. More specifically, as stated in Senate Report No. 105 on S. 1126,[24] the provisions with which we are concerned here were adopted "in order adequately to protect the public welfare which is inextricably involved in labor disputes." I pointed out that it is a necessary concomitant of the protection of the public welfare that protection is also extended to employers and employees as well, but that such protection to private interests was in no way intended to detract

[24] Senate Report No. 105, p. 8 (1 Leg. Hist. 414).

from "the public interest that constitutes the very foundation of the policies implicit in these statutory enactments." In adopting these provisions of the Act, Congress clearly adopted a public policy against all secondary boycotts, without distinction as to type or kind. To hold otherwise is to substitute confusion for clarity and to create ambiguities in the face of a clear Congressional intent. To quote from our McAllister opinion:

No amount of ingenuity, it seems to us, can change the simple fact that a "hot cargo" contract is nothing more than a device to immunize in advance the very conduct which Congress in response to a dire public need sought effectively to eliminate. To permit a form of legal sophistry to make possible so flagrant a subterfuge for continuing this well-known abuse in labor disputes is to make a mockery of one of the most significant provisions which Congress wrote into the Act.

In my view of the facts of the instant case, the "hot cargo" contract, as a subterfuge for avoiding the proscriptions of the Act and as an effort at advance immunization against unfair labor practice findings, is patently unenforceable. It follows therefore as a matter of law that this is not the type of agreement that can justify the conduct engaged in here. It is for this reason that while I concur in the result reached here I cannot join in the majority's rationale.

Dated, August 26, 1955, Washington, D. C.

PHILIP RAY RODGERS, Member
National Labor Relations Board

Ivar H. Peterson, Member, dissenting:

I do not agree with the majority of my colleagues that the Board is warranted in asserting jurisdiction here.

The facts with respect to this issue are substantially undisputed. Havstad and Jensen are joint venturers engaged in the State of California in the construction of a hospital building on the campus of the College of Medical Evangelists for the Seventh Day Adventists. This project commenced on July 1, 1952, and was still in progress at the time of the hearing. The nonunion doors were purchased by Havstad and Jensen from Watson and Dreps, millwork contractors in Los Angeles, and were valued at approximately $9,000. Watson and Dreps purchased the doors from Sand Door and Plywood Co., the charging party, which is also located in and around Los Angeles and is engaged in the wholesale jobbing of doors, plywood, and related building materials. Watson and Dreps took delivery of the doors at the Sand Door warehouse. The latter, in turn, had purchased the doors from Paine Lumber Company at Oshkosh, Wisconsin, which shipped them directly to Sand Door from Wisconsin. On the present record, the only one of the above-named firms, whose business is sufficiently large so as to afford any possible justification for assertion of jurisdiction, is Paine— the Wisconsin manufacturer of the nonunion doors. In reaching its decision to exercise jurisdiction here based upon Paine's operations the majority attempts to analogize the situation to that in the Sound Shingle Case.[25] I do not consider it necessary to quarrel with the characterization of Paine as the primary employer and Havstad

[25] See footnote 8, supra.

and Jensen as the secondary employer. However, I can not accept the majority's further conclusion that merely because such designations are made, ipso facto, there is reason for asserting jurisdiction here. In so doing, the majority is completely disregarding what for me is a critical and determinative difference between the Sound Shingle case and the instant one. Thus, in that case the Canadian manufacturer dealt directly with Sound Shingle, the employer whose employees the union was causing to refuse to work on the particular nonunion products. In the present case, we have two intermediate purchasers of the nonunion doors, between Paine and Havstad and Jensen.

I find nothing in either the Jamestown[26] or Sound Shingle cases to support the exercise of jurisdiction where, as here, the original manufacturer is the only party whose commerce facts happen to come within the Board's standards and its relationship with the ultimate purchaser is so remote. If an analogy is to be drawn between the instant case and other Board decisions, I submit that it is strikingly similar to the Brooks Wood line of cases.[27] In the latter cases, the Board has consistently declined to exercise jurisdiction over a manufacturer of goods which sells them to a purchaser within the same State, which purchaser has the manufacturer ship them directly to still another purchaser within the State, even though the final purchaser does a substantial interstate business. The chain of sales of the nonunion doors is here the same as in the Brooks Wood type of case with

[26] See footnote 5, supra.

[27] Brooks Wood Products, 107 NLRB 237; C. P. Evans Food Stores, Inc., 108 NLRB 1651; McDonald, McLaughlin & Deane, 110 NLRB 1340.

the sole exception being that there it was the ultimate purchaser, while in the instant case it is the manufacturer, which does the substantial interstate business. The rationale for the Board's refusal to exercise jurisdiction in the Brooks Wood line of cases was that the particular manufacturer's business is not once, but "twice removed" from interstate commerce. This reasoning is equally applicable here. Although I have agreed with the Board's special treatment of the jurisdictional question in secondary boycott cases as expressed in its Jamestown decision, I consider it an unwarranted extension of the rule laid down in that case to exercise jurisdiction here, despite the fact that the labor dispute involving Havstad and Jensen is twice removed from the manufacturer whose interstate commerce might be affected thereby.

I think it should be noted that the majority opinion clearly implies that in a product boycott case jurisdiction will be taken regardless of the number of intervening purchasers. Thus, if the manufacturer of nonunion products happens to do a sufficiently large interstate business, even though the goods to literally a score of intermediate purchasers all of whom, including the ultimate buyer, operate completely intrastate enterprises, the Board will assert jurisdiction solely because the manufacturer is the employer with whom the union primarily has its dispute. I believe that, to say the least, it is unrealistic not to recognize that in such circumstances, and indeed in the instant case as well, the impact of the union's activities at the situs of the secondary employer upon the commerce of the primary employer is relatively insubstantial.

In view of the foregoing, it is my opinion that it will not effectuate the policies of the Act to assert jurisdiction here. Accordingly, I would dismiss the complaint.

on this ground. However, because of the importance of the principle involved, I have also considered the merits of the case and agree with the views expressed by Member Murdock in his dissenting opinion.

Dated, August 26, 1955, Washington, D. C.

IVAR H. PETERSON, Member
National Labor Relations Board

Abe Murdock, Member, dissenting:

I concur in Member Peterson's opinion. It is apparent that the assertion of jurisdiction in this case results in a double standard of jurisdiction—a highly restrictive standard for 8 (a) cases and an almost limitless standard for cases involving violations of Section 8(b). However, as a majority of the Board is asserting jurisdiction, I have considered the case on the merits.

In this case the Respondent Union, representing employees of Havstad and Jensen, building contractors, had bargained for and secured by contract an agreement that the Company would not require workmen to handle nonunion material. In the course of constructing a Los Angeles hospital Havstad and Jensen purchased a number of nonunion doors from Watson & Dreps, retailers. The latter had purchased these doors from Sand Door & Plywood Company, wholesalers, which, in turn, had purchased them from the Paine Lumber Co., Ltd., of Oshkosh, Wisconsin. The record is perfectly clear that neither this Union nor any other Union was engaged in a dispute with any of these companies except Havstad and Jensen. That dispute related directly and solely to the Respondent Union's invocation of Havstad and Jensen's contractual commitment not to require employees to handle nonunion material. Despite the fact that the

Union acted pursuant to this contract, which a majority of the Board finds to be legal and not opposed to public policy, and despite the fact that the Union was careful to call only to the attention of Havstad and Jensen's foreman the fact that the doors in question were nonunion, three members of the Board conclude that the Union has engaged in a secondary boycott within the meaning of Section 8 (b) (4) (A). I believe that the several bases of the majority's decision are untenable.

The three members of the majority are, it appears, in disagreement as to the effect of a provision in a collective bargaining contract whereby the employer agrees that its employees will not be required to handle nonunion material. Member Rodgers adheres to his position in McAllister Transfer, Inc.,[28] in which he and former Member Beeson held that such contracts were opposed to public policy and were therefore unenforceable. I believe that Member Peterson's and my dissenting opinion in that case is a complete and adequate answer to this view. Chairman Farmer and Member Leedom now contend in this case that such contracts, while not opposed to public policy and presumably enforceable in the courts, are nevertheless no defense to allegations that the contracting Union has induced employees, whom it represents, to engage in a strike or concerted refusal in the course of their employment to handle such nonunion products.

In his concurring opinion in McAllister Transfer, Inc., Chairman Farmer rejected the view of Member Rodgers and former Member Beeson to the effect that that a "hot cargo" clause was "at war with the secondary boycott provisions of Section 8 (b) (4)." In that case he

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[28] Supra.

asserted that such a view "glosses over the plain language of the Statute which makes it an essential element of an unlawful boycott that the union 'engage in, or induce or encourage * * * employees * * * to engage in a strike or a concerted refusal' to handle the goods of another employer." He did not believe, he indicated, that a strike or a concerted refusal to work was induced where an employer voluntarily, either on an ad hoc basis or by means of a written contract provision, agreed to boycott another employer's products. He pointed out what seemed to him the fallacy in the argument that such contracts were opposed to public policy. Congress, he said, had not forbidden such voluntary acts of employers and it was for Congress, not the Board, to change the law "if conduct of this character is thought to endanger the public welfare." In the instant case he joins Member Leedom in finding that the Union's inducement of employees, despite their employer's voluntary agreement not to require them to handle nonunion material, is "contrary to the express language of the Statute." The language of the Statute, it seems to me, cannot be expressly both ways. I believe Chairman Farmer was right the first time. In a footnote, however, Chairman Farmer and Member Leedom assert that their finding in this case, cited above, is essentially the same view expressed by Chairman Farmer in his concurrence in the McAllister case. If this is so, it is, indeed, a puzzling inconsistency because it would mean that Chairman Farmer had taken the position in that case that the plain language of the Statute both permitted and forbade the operation of a hot cargo clause. I had thought the language taken from Chairman Farmer's McAllister concurrence, quoted in the above footnote, referred to a situation where, as there, the employer had repudiated his contract and directed

his employees to handle hot cargo. This would seem to be supported by his subsequent distinction of the Conway case: "It is impossible to say here, as in Conway, that there was no unlawful 'inducement' or 'refusal' on the part of the employees to handle McAllister freight. This is so for the simple reason that the secondary employers here posted notices to their employees directing them to handle all freight without discrimination."

I am, moreover, at a loss to understand the new rationale which he and Member Leedom expound. First they agree that the inducement of employers to cease doing business with other employers is not unlawful under Section 8 (b) (4) (A). They then concede that what an employer may be induced to do he may be induced in advance to do by the execution of a contract freeing his employees from the duty of handling nonunion material during the term of the contract. Notwithstanding these findings, they thereupon take the position that the Union may not approach the employees it represents and for whose benefit the contract was made to notify them that their contract reserves to them the right not to handle nonunion material. Such notification, they find, induces these employees to engage in a strike, despite their employer's advance permission granting them the right to refrain from performing this work. These conclusions, in my opinion, cannot logically stand together. A contract does not consist of words on a piece of paper. It is a binding agreement between the contracting parties that requires them to behave toward each other in a specific manner under a given set of circumstances, present or future. If they can legally agree, as Chairman Farmer and Member Leedom concede they can, that employees will not be required to handle nonunion material,

I know of no authority that would define as a "strike" or a "refusal to work" the union's reliance upon this contractual permission. To find that employees are induced to engage in an act of insubordination against their employer solely on the ground that their own bargaining representative called to their attention the existence of a lawful provision in their lawful contract seems to me an untenable conclusion. It was, in my opinion, the duty of this Union to keep the employees it represented informed at all times of their rights under the contract, including the fact that handling nonunion material was not within the scope of their employment.

The decision of Chairman Farmer and Member Leedom encourages employers to violate their lawful agreements with labor organizations. Indeed, it tells them that they may freely take whatever the Union has given in collective bargaining to secure such an agreement without fear or ever having to pay the quid pro quo. It repudiates for an employer a voluntary agreement that he has never repudiated himself. It forbids a union, under penalty of the Board's injunctive processes, to assume that the employer meant what he said when he agreed in advance that his employees would not have to handle nonunion material. Such a decision gravely and adversely affects the collective bargaining process, which it is the duty of this Board to promote and encourage. In this respect, it does not serve the general welfare and does not effectuate the intent of Congress to minimize strife and establish peaceful collective bargaining in the field of labor relations.

The majority further finds that the Union's object in this case was "to force or require" Haystad and Jensen to cease using or handling nonunion doors. But that Com-

pany . . d already agreed, as a majority of the Board finds, that it would not require its employees to handle such products. It was not, then, business agent Fleisher's remarks to foreman Steinert which "forced or required" the Company to instruct the carpenters to cease performing this work. The Company was required by its contract, which a majority of this Board finds to be lawful and not opposed to public policy, to free its employees from the duty of handling nonunion material. In this respect, at least, the instant case is entirely distinguishable from the Sound Shingle case,[29] upon which the majority relies. Here the dispute was directly and immediately related to a condition of employment of Havstad and Jensen's employees, a condition resolved through collective bargaining and reduced to writing. Under these circumstances, it seems clear to me that the dispute was primary in nature and that it was not "an object" of the Union to affect the business relations between Havstad and Jensen and any other employer or person. As Judge Learned Hand has recently pointed out in a scholarly opinion,[30] there must be a distinction between the term "object" under Section 8 (b) (4) and a result that may flow from the Union's action. The liability imposed by this section, he held, "is much more limited than the usual liability for a tort, which extends to any damage that the tortfeasor should reasonably have expected to result from his act." If Congress had not imposed such a distinction, he pointed out, it would have made nearly all strikes unlawful. Where, as in the instant case, a union's objective is clearly and unmistakably limited to a primary

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[29]Supra.

[30]Douds v. Longshoremen's Association, 36 LRRM 2329, 2332.

dispute, involving an employer's contractual obligation, the fact that this dispute may in some manner affect other employers with whom the union has no dispute at all does not mean that "an object" of the union is to reach these employers and engage in secondary conduct within the meaning of Section 8 (b) (4) (A). Senator Taft's statements on the floor of the Senate, quoted extensively in footnote 21 of the majority's decisions, seems to me to affirmatively support this conclusion. In his view Section 8 (b) (4) (A) made it unlawful to incite workers to strike "when they are perfectly satisfied with their conditions. If their conditions are not satisfactory, then it is perfectly lawful to encourage them to strike." (Emphasis added.) What could be more unsatisfactory to a group of employees than the imminent violation by their employer of a condition of their employment, a condition secured through the processes of collective bargaining and incorporated in a contract?

Apart from the foregoing, it seems to me that the majority's conclusion that Havstad and Jensen's foreman, Steinert, was acting solely as an agent of the Union when he instructed several employees not to handle the nonunion doors is unsupportable. The majority bases its finding on the fact that Steinert was a member of the Union and, as such, had agreed to enforce the Union's by-laws and trade rules. It is, however, uncontroverted that Steinert was also the authorized agent of Havstad and Jensen to whom the employees looked for instructions in the performance of their duties. If Steinert was acting for the Union he was no less under the common law rules of agency acting on behalf of Havstad and Jensen, who had authorized him to represent the Company and speak for it in supervising the work of these employees. At

most, therefore, any statements or actions of Steinert with regard to his work instructions to these employees must be construed as the joint action of both the Union and the Company. It is incomprehensible to me how the majority can conclude that employees, obediently following the instructions of their own foreman, are thereby being induced to engage in a strike or a concerted refusal to work for their employer. Indeed, I would suppose that the employees would be engaged in insubordination if they refused to follow Steinert's instructions. The fact that Havstad and Jensen permitted Steinert, its agent, to agree to enforce union rules seems to me to indicate nothing more than that the Company itself had consented to this procedure and made itself a party to such conduct by its foreman. To ignore Steinert's status as the Company's spokesman and to find, rather, that he represented only the Union and thus induced a strike of the employees he supervised, seems to me an unwarranted and unreasonable conclusion.

For these reasons I dissent.

Dated, August 26, 1955, Washington, D. C.

ABE MURDOCK, Member
National Labor Relations Board

APPENDIX "C."

Labor Management Relations Act of 1947.

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

"SEC. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(B) "(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

"(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which

application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional

evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 127

LOCAL 1976, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A. F. L., LOS ANGELES COUNTY DISTRICT COUNCIL OF CARPENTERS; NATHAN FLEISHER,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONERS.

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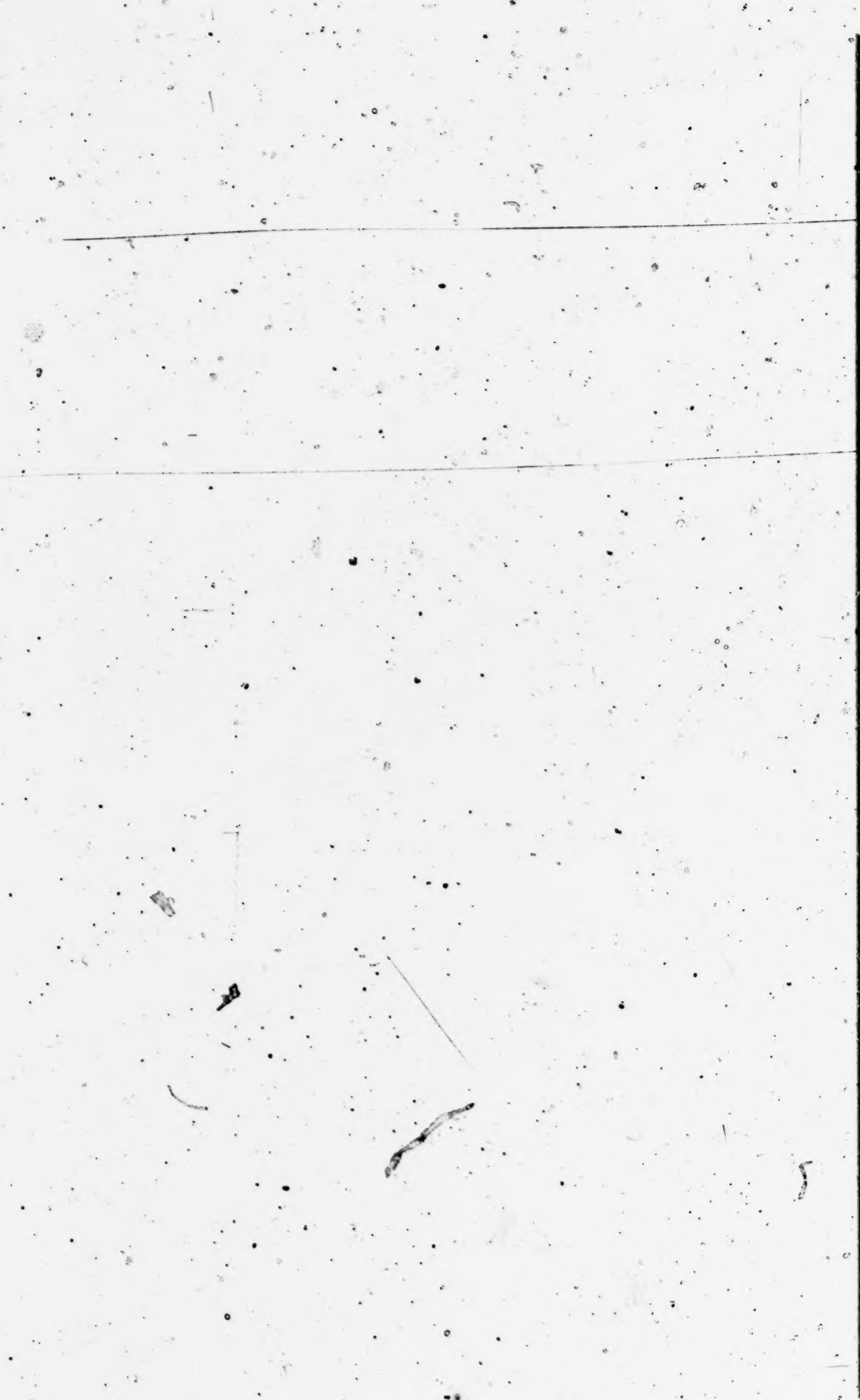
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Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONERS.

Citations to Opinions Below.

The opinion of the United States Court of Appeals for the Ninth Circuit, dated February 12, 1957, is reported at 241 F. 2d 147. The Decision and Order of the National Labor Relations Board enforced thereby is reported at 113 N.L.R.B. No. 123.

Jurisdiction.

The petition for a writ of certiorari was granted on October 14, 1957.[1] The jurisdiction of the Court is based upon 28 U. S. C. 1254(1) and Section 10(e) of the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U. S. C. 141, *et seq.*

Questions Presented.

1. Whether substantial evidence supports the Board's conclusion that the unions' conduct was not primary activity outside the scope of Section 8(b)(4)(A).

2. Whether substantial evidence supports the Board's conclusion that the unions, through the activities of foreman Steinert, "induced and encouraged" employee refusals to work within the meaning of Section 8(b)(4)(A).

3. If the answers to the first two questions are in the affirmative, whether the Board and court below properly concluded that Section 8(b)(4)(A) is violated by the enforcement, through union instructions to member workmen, of a clause in a collective bargaining agreement stating that "workmen shall not be required to handle non-union material," notwithstanding the employer's acquiescence in such refusals to handle such materials.

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[1] This Court's order allowing certiorari provides that this case be consolidated with No. 273 (*National Labor Relations Board v. General Drivers, etc., No. 886*) and No. 324 (*Local 850, Intl. Assn. of Machinists v. National Labor Relations Board*) for argument. The Board and Court citations below of these cases are 115 N.L.R.B. 800 and 247 F. 2d 71 (C.A.D.C.).

Statute Involved.

The statutory provisions principally involved are Sections 7 and 8(b)(4)(A) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 141, *et seq.*). These sections read as follows:

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

"SEC. 8(b). It shall be an unfair labor practice for a labor organization or its agents—

* * * * * * * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * *"

The other relevant provisions of the Act are reprinted in the Appendix.

Statement.

A. The Labor Dispute.

This case arises from a labor dispute in August, 1954 involving the petitioning unions, Local 1976 and Los Angeles District Council of Carpenters (hereinafter jointly referred to as Carpenters Union), and Havstad and Jensen, building contractors, of Los Angeles, California. The following résumé of the facts of the dispute is based upon the findings of the Trial Examiner which were adopted without substantial alteration by the Board and the court below, together with uncontradicted evidence in the record. Except for certain conclusionary fact findings by the Board which will be hereinafter noted, petitioners do not challenge the findings here.

Havstad and Jensen, as building contractors, were parties to a Master Labor Agreement [R. 193-195], negotiated in their behalf by the Building Contractors Association, and the United Brotherhood of Carpenters and Joiners of America, for its affiliated District Councils and Local Unions in Southern California [R. 195-196, 197, 201-204.] This agreement governed the wages and working conditions of the employees of Havstad and Jensen. [R. 201-204.] Among the conditions of employment created by this agreement was a provision that, *"Workmen shall not be required to handle non-union material."* [R. 203.] By the express terms of this agreement, the parties covenanted that they would take no action, by any means whatsoever, "that will prevent or impede . . . . the full and complete performance of each and every term and condition hereof." [R. 203-204.]

At least one of the contractors, Jensen, had maintained contractual relations with the Carpenters Union, through the Building Contractors Association, since 1933 or 1934. [R. 194-197.]

In August, 1954 Haystad and Jensen, as joint venturers, were engaged in the construction of a hospital and other buildings on the campus of the College of Medical Evangelists, a medical school and nurses' training school owned and operated by the Seventh Day Adventists in Los Angeles.

Doors for the hospital, which was known as the White Memorial Hospital, were manufactured by Paine in Oshkosh, Wisconsin, and were purchased by Sand Door and Plywood Company, a wholesale jobber and exclusive agent for Paine in Southern California. Sand sold the doors to Watson & Dreps, mill work contractors, with delivery between August 14, 1954, and August 17, 1954. A few days before August 17 some of the doors were delivered to the jobsite of Haystad and Jensen. [R. 209.] The doors had not been manufactured by union labor since Paine "had no union connection" of any kind. [R. 19.]

Arnold Steinert, Haystad and Jensen's foreman, at this building site, whose duties involved the assignment and supervision of work performed by the carpenters and laborers at this location, and who was in charge of the operations in connection with James Nicholson, the general superintendent for Haystad and Jensen [R. 105-106], on August 17, 1954 carried out his usual functions. In the normal course of the work, the employees report for work at 8:00 A.M., but Steinert, as foreman, usually arrives ahead of the employees, and lays out his work plans for the day and assigns the various employees to the tasks he has selected for them. After the delivery

of these doors in question, Steinert instructed the laborers of Havstad and Jensen to distribute these doors to the various floors of the building; preparatory to their being "hung" by a carpenter, by the name of Sam Agronovich. About the same time, Steinert instructed Agronovich to begin the necessary preparations.

From the beginning of work done that day (8:00 A.M.), until after 11:00 A.M. Steinert was the only official of Havstad and Jensen present at this building site and was then in sole charge of all the employees. [R. 131-132.] Shortly before 11:00 A.M., of that day, Nathan Fleisher, business agent of Respondent Carpenters' Local 1976, came to the building site and met Steinert in the lobby of the building and told Steinert that the doors were non-union and that "We'd have to quit hanging the doors until it was settled." The laborers, pursuant to Steinert's previous instructions, were, at the time, moving the doors from floor to floor, and Steinert instructed them to cease the distribution. [R. 164-165.]

Steinert then went to where Sam Agronovich was working and instructed Agronovich to discontinue the preparatory work, as the doors appeared to be non-union, and assigned Agronovich to other duties. After that, Steinert went on with his work, "going around to check on the work progress of the other employees under his supervision." [R. 165-166.] Fleisher, the business agent of Respondent Carpenters' Local 1976, took no part in any of these attendant conversations or instructions by Steinert [R. 167-168], but was present when Steinert spoke to Agronovich.

Nicholson, the general superintendent, reported on the job about thirty minutes after the above occurrence,

learned what had happened, and went to the job site looking for Fleisher and found the laborers were waiting for Steinert to assign them to other duties. [R. 113-116, 136.] Nicholson then went directly to Fleisher [R. 132] and asked him why he had stopped the men from hanging the doors. [R. 133-134.] Fleisher said he had taken this action so that it could be determined whether the doors were union or non-union. Nicholson admittedly lost his temper and ordered the employees to "pick up their tools," the equivalent of discharge, but upon calmer reflection directed that Sam Agronovich be assigned to other duties. All other carpenters continued in the performance of tasks previously assigned to them by foreman Steinert. [R. 118, 135.] Neither Nicholson nor Steinert assigned or attempted to assign any of the other carpenters to the duty of hanging doors. [R. 135.]

James C. Barron, vice-president of Sand, later learned that the hanging of the doors had been stopped and telephoned to Earl Thomas, secretary of Respondent District Council, asking "what the story was regarding the hanging of the doors" and was told by Thomas that he intended to ascertain if the doors were union made, and would advise Barron of his discovery. [R. 177-178.] The following day Thomas advised Barron that the doors were not union made and informed Barron that carpenters could not hang non-union doors. Thomas attempted to persuade Barron to have his company deal in union products and sought to work out a plan whereby the doors could be installed and future installation could be made on conformance with the provisions of collective bargaining agreements that prohibited employees from handling non-union materials. Barron declined to cooperate in these suggestions. [R. 178-180, 186, 191.]

Sand next filed the instant charges and the Board sought an injunction in the United States District Court for the Southern District of California, which was denied. During the hearing in that matter, the judge observed that only one person had been stopped from hanging the doors and that no other carpenters had been assigned to such tasks or requested to do so. The day following this observation, at the instance of Sand, Nicholson, Havstad and Jensen's general superintendent, and a member of the carpenters' union, and Steinert, as superintendent on the job, went to each carpenter, separately, and asked each if he "would be willing to hang the doors" and from each received a negative reply. [R. 136-150.]

Havstad and Jensen did not request Local 1976 to furnish other men to hang these doors. [R. 150-153; 97.]

Steinert was a member of a constituent local of Petitioner, Los Angeles County District Council of Carpenters. The latter's By-Laws and Trade Rules provide:

> "All foremen are to be held equally responsible (the same as the Steward) for the enforcement of all By-Laws and Trade Rules of the District Council. Violators of this paragraph shall be subject to a fine of $100.00 and/or expulsion.
>
> "No member shall use, handle, install or erect any material produced or manufacturer from wood that is not produced and manufactured by members of the United Brotherhood of Carpenters and Joiners of America." [R. 198-201, 53.]

B. Proceedings and Decision of the Board.

On August 25, 1954, Sand filed charges against petitioners, alleging that the foregoing conduct was in violation of Section 8(b)(4)(A) of the Act. After issuance of complaint and the usual hearings, the Trial Examiner

of the Board filed his Intermediate Report and Recommended order on December 13, 1954. After making findings substantially as stated above, he recommended dismissal of the complaint. [R. 207-208.] He concluded that petitioners had "induced and encouraged" employees of Havstad & Jensen to refuse to hang the Paine doors (1) because of the conduct of Fleisher, (2) because of the trade rules and by-laws of the District Council and (3) because "of the reservation in the collective bargaining contract of a right to refuse to work on non-union material." [R. 24.] He further found Havstad & Jensen to be the primary employers and Paine and Sand to be the secondary employers involved. [R. 21-22.] The object of the unions' conduct was found to be the forcing or requiring of Sand Door to cease doing business with Paine. [R. 27.] His recommendation of dismissal was premised upon *Chauffeurs, Teamsters, Warehousemen and Helpers Local Union No. 135 (Pittsburgh Plate Glass Co.)*, 105 N.L.R.B. 740, which he deemed "the latest expression of the Board on the point." He construed this case as holding that employee refusals to handle materials were not refusals "in the course of employment" within the meaning of the secondary boycott section where the collective bargaining agreement contains provisions authorizing or directing employees to refrain from work on those materials. [R. 24-25, 27.]

Although a divided Board substantially adopted the Trial Examiner's findings of fact [R. 49], it rejected his conclusions and recommendations and found a secondary boycott violation. Havstad & Jensen were found to be secondary or neutral employers. [R. 51.] The entire rationale of the Trial Examiner upon which he had based his finding of union "inducement and encouragement" of employee action was discarded. In its place

a majority of the Board substituted the following chain of reasoning: (1) Fleisher, an admitted union agent, "approached Steinert in Steinert's capacity as agent of the Respondent's District Council," rather than in his capacity as a foreman and representative of Havstad & Jensen; (2) Steinert acted as an agent of the unions in ordering the laborers and carpenter Agronovich to stop handling doors, rather than in his capacity as their foreman; (3) Steinert's conduct is attributable to the Local Union because the District Council By-Laws and Trade Rules make foremen jointly responsible with stewards for the enforcement of such rules on the job; (4) one of the Council's Trade Rules forbids members to work on non-union materials and it was this trade rule, rather than the similar collective bargaining provision, which Steinert sought to enforce. [R. 52-55.]

On the authority of *Washington-Oregon Shingle Weavers' District Council (Sound Shingle Co.)*, 101 N.L.R.B. 1159, enforced 211 F. 2d 946 (C. A. 9, 1954), the Board rejected the unions' contention that its activities were in support of a primary labor dispute with Havstad & Jensen. [R. 55.] Like the Trial Examiner, the Board majority concluded that an object of the unions' actions was to force or require Sand to cease doing business with Paine and found the further objective of forcing or requiring Havstad & Jensen to cease doing business with Sand. [R. 55-56.]

Upon the crucial question of the effect of the provision of the collective bargaining agreement that workmen should not be required to work on non-union ma-

terials, three members of the Board agreed, for different reasons, that it afforded no justification for union-induced employee refusals to work on such materials. Members Peterson and Murdock dissented on this point as well as the other holdings set forth above. Former Chairman Farmer and present Chairman Leedom, whose holding became the Board's decision, reasoned that there was nothing unlawful in the "non-union materials" clause nor in union appeals directly to the employer to honor it. But any direct appeal to employees to assert their privilege not to handle non-union materials in accordance with the clause, otherwise within the secondary boycott prohibition, would be a violation, notwithstanding the employer's acquiescence in the union's demands. Member Rodgers in a concurring opinion adhered to the position taken by him in the *McAllister Transfer* case, 110 N.L.R.B. 1769, that all types of "hot cargo" clauses are illegal *per se* and for this reason no defense to a secondary boycott charge.

The effective majority opinion was succinctly stated in the following words:

> "Insofar as such contracts govern the relations of the parties thereto with each other, we do not regard it our province to declare them contrary to public policy. However, we do not agree that unions, which are parties to such contracts, may *approach* employees of the contracting employer and induce and encourage them to refuse to handle the goods of another employer with immunity from the sanctions of Section 8(b)(4)(A). . . . The employer, but not the union, may instruct his employees to cease handling goods sought to be boycotted." [R. 59, 60.]

C. The Decision of the Court Below.

The court below enforced the Board Order adopting in substance the reasoning of the Board majority. [R. 207-226.] On the authority of its own decision in *National Labor Relations Board v. Washington-Oregon Shingle Weavers District Council, supra*, it rejected the unions' contention that enforcement of the "non-union materials" clause involved primary rather than a secondary union activity. Further reliance was placed upon the Board Decision in the *General Driver (American Iron and Machine Works Company)* case, 115 N.L.R.B. 800, which was decided after the Board decision in the instant case and whose holding is largely premised on the instant case. (As stated in footnote 1, *supra*, The *American Iron and Machine* cases are calendared for argument with this case.) With respect to the unions' claim of lack of evidence to support the finding of employee inducement, the court reasoned that "it is logical to assume that he (union agent Fleisher) was invoking (foreman) Steinert's obligations under the union's rules." A provision of the collective bargaining agreement waiving union rules "with reference to the relations between the contractors and their employees" was ruled inapplicable to union foreman Steinert.

Summary of Argument.

I.

Section 7 of the Act guarantees to employees, acting in concert with each other or through their unions, the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

In every case in which the exercise of these rights takes the form of striking, refusing to perform work tasks or otherwise exerting economic pressure upon an employer there is an inevitable involvement, to some degree, of other employers and the public at large. This results from the very nature of a production and distribution system based upon an open competitive market and a price system left largely to the play of forces of supply and demand for both goods and labor. By Section 8(b)(4)(A) as well as other sections of the Act Congress sought to limit to some degree, but not to eliminate, the impact of Section 7 activities upon the habits, practices, interests and desires of the public generally—including other employers, employees, and citizens generally. Whatever the intention of the Congressional majority may have been in setting these limits, the words used in the section were shortly found by the Board and the courts to yield possible, and even plausible meanings, which would foreclose the use of economic pressure by unions and their members for any purpose or objective. In order to prevent this result, so obviously destructive of the entire statutory scheme, the Board, with court approval, construed the section as having no limiting application to union inducement of strike action by employees in support of demands against their own employer having a reasonably direct relationship to their own terms and conditions of employment. Since the statute encourages and, in some

circumstances, compels the execution of collective bargaining agreements as the means of fixing terms and conditions of employment in the interest of labor peace as well as the affirmative promotion of living standards of workers, direct union sponsored economic action by employees against their own employer to compel him to give effect to lawful bargained conditions of work would appear without question to be "primary" activity. The actual or threatened economic *effect* of such conduct upon other employers or the public generally cannot be the measure of legality under the section so long as the objective or purpose of the union is related to the enforcement of lawful contract provisions and is not a subterfuge for the imposition of economic sanctions upon other employers.

In the instant case, the Board majority specifically found that the "non-union material" provisions in the collective agreement were not themselves in contravention of the statute or its policies. Having so found, the only rationale which will support the Board's conclusion that the unions' use of traditional primary means to effect enforcement of the clause is in reality a proscribed "secondary" boycott is the substitution of the word "effect" for "object" in the section. Aside from the legislative character of such a substitution, the Board would have largely destroyed the distinction between "primary" and "secondary" activities which alone allows the section to be read in harmony with the broad protections of Section 7.

II.

Independently of all other issues in the case, the Board's finding of unfair labor practices fails unless there is preponderant evidentiary support in the record for its

finding that the unions induced or encouraged employees to refuse to handle the non-union doors. This finding is based solely upon the instructions given by company foreman Steinert to some laborers and one carpenter. As will be shown by an examination of the undisputed evidence, the conclusion is based not upon evidence but upon presumption and conjecture.

III.

The Act does not, either expressly or through its underlying policy, make unenforceable the "non-union materials" clauses through union advice to its members to assert their rights thereunder. As found by the Board and the courts such provisions are themselves lawful. It follows that enforcement through union induced action of the beneficiaries of the clause cannot be unlawful because such a holding would in practice outlaw the clause itself. The language of the secondary boycott section does not reach the unions' conduct here because (1) the contract removed work on non-union materials from the course of the carpenters' employment, (2) the company's acquiescence in the refusals to work both by contract and by actions at the time the non-union materials appeared at the job site, shows that there was no strike, inducement to strike or concerted insubordination as required by the section, (3) in view of the provisions of the clause and the company's acquiescence in its enforcement the company was not "forced or required" to do anything within the meaning of these words as they appear in the section, and (4) as shown in Point I above the illegal object required by the section is not present when the union is enforcing only the primary obligation contained in its contract with the employer.

ARGUMENT.

By agreement with counsel for the respondent General Drivers in No. 273 (*National Labor Relations Board v. General Drivers, etc., No. 886*) and for the purpose of avoiding duplication, the principal arguments in favor of the validity and enforceability of "hot cargo" type agreements will be set forth in respondent's brief in No. 273 which is herewith adopted, to the extent applicable, as a statement of the position of these petitioners. The following arguments are an application of the controlling legal principles to the factual situation presented in this case, as distinguished from No. 273.

I.

The Unions' Conduct Was Primary Activity Outside the Scope of the Secondary Boycott Section of the Act.

The Trial Examiner was correct in finding that Havstad and Jensen was the primary employer because he recognized from the evidence that there was a dispute between Respondents and Havstad and Jensen that involved a working condition prescribed by a collective bargaining contract by which Havstad and Jensen had bound themselves not to require their employees to work on non-union materials. [R. 203-204, 193-196, 197.] That, and that alone, was the genesis of this controversy, and no amount of legal sophistry can make anything else of it. It was no more than an accident that Paine doors were the thing that pointed up the breach of the collective bargaining contract on the part of Havstad and Jensen when they sought to require their employees to do what they had previously legally agreed not to require. The process of collective bargaining is always designed to

establish the rules under which employees accept employment and the employer to obtain the benefits of that employment. The requirement, freely accepted by Havstad and Jensen, that their employees were not to be required to work on non-union materials is as much a condition of work as wages, hours or other conditions of employment. Not only did Havstad and Jensen bind itself by this requirement to remove from the working conditions the necessity of employees working on non-union goods, they further agreed, to insure faithful performance of this contractual provision, that they were under no disability of any kind whether arising out of the provisions of Articles of Incorporation, Constitution, By-laws, or otherwise, that would prevent them from fully and completely carrying out and performing each and all of the terms of the agreement, and further, that they would not by contract or by any means whatsoever take any action that would prevent or impede them in the full and complete performance of each and ever term and condition of the collective bargaining agreement. [R. 203-204.]

Thus, when Respondents protested the violation of the bargaining compact, they were in direct dispute with Havstad and Jensen. The involvement of Paine was sheer mishap. Under this record we respectfully submit that the Trial Examiner's conclusion that Havstad and Jensen were the primary employers is cogently sustained by the record and that the Board erred in finding to the contrary.

As shown in the economic brief filed in No. 273, clauses of this type have existed and undoubtedly been enforced by union action at jobsites for many years antedating the passage of the Taft-Hartley Act. This fact itself

argues most strongly that such clauses serve a purpose directly and reasonably related to the terms of employment of the employees covered thereby. This history negates any inference that the clauses were or are an effort by unions to contract themselves out of the proscriptions of Section 8(b)(4)(A). On the contrary this court has indicated that traditional and long established trade union practices and techniques are encompassed within the protection of Section 7 of the Act. The Court said in *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U. S. 342, 346, of the provisions of the Railway Labor Act which are cognate to Section 7 of the National Labor Relations Act:

> "Collective bargaining was not defined by the statute which provided for it, but generally has been considered to absorb and *give statutory approval* to the philosophy of bargaining as worked out in the labor movement in the United States."[6] (Emphasis supplied.)

By its express terms Section 13 of the Act preserves the right to strike and the limitations upon such right as they existed prior to the passage of the 1947 amendments except to the extent that such rights were "specifically" limited by the new sections, including Section 8(b)(4)(A). Section 7 therefore remains the general measure of union rights to engage in collective bargaining and to pursue traditional trade union objectives by traditional trade union means. If broad scope is to be given to any section it is this one, rather than the limiting provisions of the secondary boycott amendment. It is the former and not the latter which continues to express the general policy

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[6] *Cf. H. J. Heinz v. N.L.R.B.*, 311 U. S. 514, 523-526.

of the Act. Section 13 furnishes the two canons of construction applicable to the two sections—broad in the case of Section 7 and narrow in the case of Section 8(b)(4)(A). The rationale of the majority of the Board by which it gives broad sweep to the latter is not permissible under the express terms of the statute. In determining what is primary and what is secondary activity, the same rules of construction ought to apply. Certainly this is true where the conduct being evaluated has for many years been a part of the "philosophy of bargaining as worked out in the labor movement in the United States."

For the foregoing reasons the Board erred in reversing the Trial Examiner's finding and conclusion that the unions' activities were in connection with a primary dispute rather than a secondary one. Concededly, the pursuit of such primary objectives by the means shown is not only lawful but affirmatively protected under Section 7 of the Act.

II.

There Was No Substantial Evidence to Support the Board's Finding That Petitioners Induced and Encouraged Employee Refusals to Handle the Non-union Materials.

The unique approach of the Board majority in concluding that there was a violation of the act, requires an examination of the evidence from which the Board concluded that Arnold Steinert, the foreman for Havstad and Jensen, was an agent of Respondents. The importance of this finding is apparent from the admission of the Board that it is proper for a labor organization to exert pressure against an employer to accomplish a boy-

cott and in the further view that the Board has held that the collective bargaining contract, with its restrictive clause, that "workmen shall not be required to handle non-union material," is not *per se* violative of the act. Consonant with the position of the Board is the conclusion that had Fleisher's appeal to Steinert been an appeal to management no violation would have been found. In order for the Board to make this uniquely strained construction stand up it was necessary for the Board to infer that Steinert was an agent of respondents and not a managerial actor. It is well settled that such an inference must be based upon the preponderant facts and that such a mere inference standing alone is without substance.

The Board relies solely upon the evidence which is found in the by-laws and trade rules of Respondent Council wherein it is stated that "foremen are to be held equally responsible . . . for the enforcement of all by-laws and trade rules of the District Council." The Board says that from this, it is reasonable to conclude that Fleisher was invoking Steinert's obligation under the union's rules and made him the union's agent for their enforcement. But the fallacy of this conclusion is that it is based upon nothing in the record which points to the rule as being the motivating factor which prompted Steinert's conduct. In a similar case and under like conditions, the Seventh Circuit, in *Joliet Contractors Ass'n v. N.L.R.B.*, 202 F. 2d 606, and the Board, in *Glaziers Union Local 27*, 99 N.L.R.B. 1391, both held that by-laws standing alone do not prove a motivating factor sufficient to sustain an agency theory. The Seventh Circuit pointed out that something more than the mere existence of by-law provisions were necessary; that there must be probative evidence that the actor was in fact following

the dictates of such rules. There is, of course, no evidence that the by-laws and rules had anything to do with the action taken by Steinert. The Board seizes this rule as pointing up the culpability of Steinert and totally ignores the provision of the collective bargaining contract which expressly provides, *"that any provision in the working rules of the Unions, with reference to the relations between the Contractors and their employees, in conflict with the terms of this Agreement shall be deemed to be waived and any such rules or regulations which may hereafter be adopted by the Unions shall have no application to the work hereunder."* [R. 204.]

Thus, the provision of the rules are not to reach the end which the Board decides, but it is the provisions of the contract that govern, not the working rules. With this waiver of the rules, established by written contract, Fleisher's appeal to Steinert could only have been based upon the collective bargaining restriction against employees handling non-union materials.

There is no dispute but that Steinert was a foreman in the commonly accepted sense, and that within the meaning of the Act he was a supervisor and not an employee covered by the provisions of the statute. (Sec. 2(3) and 2(11); 106, 123, 131-132, 139-140, 135, 162-164, 166.) Steinert was subordinate to James Nicholson, the general superintendent, and in Nicholson's absence Steinert was in full charge of the job. Steinert's normal functions consisted of laying out work plans for the day, assigning various employees to the work tasks and making periodic checks of the work progress by going to the various locations of employees, observing their work and progress and generally seeing that all employees were

efficiently performing their assigned tasks. This Steinert did on August 17.

When Fleisher came to the building site on this date, the only representative of management present was Steinert. *Nicholson was absent.* There was no other representative of management present for Fleisher to appeal to. In the words of general superintendent Nicholson, Steinert was in complete charge of all operations. [R. 131-132, 137-138, 143.] Fleisher said nothing about the by-laws or trade rules; in fact, there appears that there never was any conversation by anybody about the trade rules. Obviously, Fleisher's appeal was to management.

As further evidence that Steinert was not acting as an agent of Respondents or motivated by the trade rules was the first official action taken by Steinert, and that was to stop the *laborers* from distributing the doors. Admittedly, Fleisher did not represent, nor was he speaking for the laborers. *The laborers are not covered by the trade rules of Respondent Council*, nor are they members of any labor union subject to those rules. [R. 158, 165.] The next official act taken by Steinert was to direct a carpenter to cease handling the doors. This was the same carpenter that Steinert had previously assigned to the task of making the preliminary arrangements to "hang" the doors. Thus we have a startling inconsistency. When Steinert assigned the carpenter to this task, Steinert was acting for management, but when Steinert directed the employee to cease that assignment and begin another one Steinert becomes an agent of Respondents.

It is uncontroverted in this record that Steinert was the authorized agent of Havstad and Jensen, to whom the employees looked to for instructions in the performance of their work and the assignment of their job tasks; it is

abundantly clear that had the employees refused to follow the instruction of Steinert they would have been guilty of insubordination as pointed out in Member Murdock's dissent.

We submit that for the Board to ignore the proven managerial status of Steinert, in view of the undisputed evidence, and to find that he represented Respondents and thus induced a strike of employees he supervised is an unwarranted and unreasonable conclusion, and not supported by the substantial evidence on the record considered as a whole.

This being true, Respondents are not responsible for the acts of Steinert, and under the majority's admitted position, as expressed in its decision, there has been no inducement of employees by Respondent, an indispensable element of a violation of 8(b)(4) of the Act.

III.

Enforcing the Contract Provision Against Handling Non-union Materials by Union Inducement of Employee Refusals to Handle Does Not Violate Section 8(b)(4)(A).

Prior to the decision in this case the Board had uniformly held that where an employer had bound himself by the collective bargaining process not to require his employees to work on non-union materials the execution of such a provision did not amount to a violation of the secondary boycott proscription of the statute. In this the Board was strongly supported by the decision of the Second Circuit in *Conway Express v. N.L.R.B.*, 195 F. 2d 906, 912. In that case a collective contract had, in like manner, removed from the employment area any requirement to work on non-union goods. Charged by Conway

of 8(b)(4)(A) violations (on which the Board had ruled against Conway), that court said:

> "The Union cannot have committed an unfair labor practice under this section in regard to those employers who refused to handle (Conways) shipments under the terms of the area agreement provision relating to cargo shipped by struck employees. Consent in advance to honor a hot cargo clause is not the product of the unions 'forcing or requiring any employer . . . to cease doing business with any other person.'
>
> "Of course, the direct strike against petitioner himself is not a secondary boycott. The distinction between the primary and secondary employer for the purpose of the section is now well recognized."

The court below in the *Sound Shingle* case, *supra*, assumed the decision of the Second Circuit to be a proper statement of the law with respect to the hot cargo phase, but did not apply it because the court found there was no agreement in the *Sound Shingle* case which had a provision removing hot cargo from the employment area. However, the court there said that the Board had long recognized that where there were agreements, such as present here, "it would be a waiver of the employer's statutory protection against secondary boycotts," which the court thought was the correct principle of law to be applied. In order to sustain the Board's current change of position, the court has necessarily overruled *Sound Shingle* although continuing to cite it with apparent approval.

Here two members of the Board seek to overrule the Second Circuit and the decision of this court. The four members hold that where an employer, at the request of a union agrees to boycott the goods of another employer

there is no violation of Section 8(b)(4)(A) because there has been neither a strike nor inducement or encouragement of employees to engage in such conduct. Say these four members, "what an employer may be induced to agree to do at the time the boycott is requested, he may be induced to agree in advance to do by executing a contract containing a 'hot cargo' clause." The fifth member would hold such clause void. But at this point the members part company. Two members say that while such a contract is not against public policy and otherwise valid, the union may not approach the employees of the contracting employer and in accordance with the contract provisions induce those employees to observe the hot cargo provisions without engaging in a violation of the section of the statute here considered. Two other members hold that such a construction is destructive of the collective bargaining benefits and that it does not amount to a violation when the union agents inform the employees, for whose benefit the collective pact is executed, of the hot cargo provisions or attempts to have such employees abide by the rule thus established. The fifth member, Mr. Rodgers, emphatically refused to adopt the reasoning or conclusions of the other four, holding that such clauses are void as against public policy. Only because of his belief that such clauses are void did Mr. Rodgers join the two members who held the union incapable of enforcing the contract through employee participation. He expressly rejected their reasoning.

We submit that the dissenting opinion of member Murdock is the only logical and proper decision that can be reached in this case and we adopt by reference all of the arguments against the validity of the order which he presents.

We agree that it is illogical to conclude, as two members of the Board do, that it is legal and proper to adopt a hot cargo provision in a collective bargaining contract but that a union, party to such agreement, is barred by the statute from acquainting the employees benefited by the collective contract of the provision and requesting or commanding that such employees obey those provisions. The members who so held do not quarrel with the propriety of the union exerting pressure against the contracting employer to reach the same results. That, they say is permissible. But if the union tells its members about the provision and that results in the provisions of the contract being carried out, then the union has contravened the statute.

It is unquestionably the employees for whom the contract is reached. In the collective action which culminates into a contract under which the employee accepts employment and the terms by which the employer agrees to employ, where that collective contract speaks of the relationship, employer and employee are contractually defined. We urge that there is no difference in entering into an agreement that employees will not be required to work on non-union goods than there is that the employees will not be required to work under unsafe conditions, or that the employees will not be permitted to use certain types or makes of tools, either for reasons of safety or productivity. Such restrictive provisions are common in labor contracts. These provisions can and do result in "boycotting" the makers of those tools and cause the employer to refrain from dealing with those makers. Yet, it is not contended, and we doubt it will be, that such restrictive covenants amount to a secondary boycott. The point is that all of these are conditions of work. All of these matters are

reasonably necessary for the peaceful relations of the employer and his employees and the enhancement of the productive effort. There is no difference between a requirement that the employer will not require productive efforts on non-union materials than that the employer will be required to pay wages or confer other working benefits to his employees. We suggest there is nothing improper in the insistence by a union that a contracting employer obey the restrictions concerning the types and makes of tools, although that may, and has, resulted in not using those articles, or that the employer pay wages or perform other provisions of the collective action even though it may result in some supplier being unable to inject his offensive articles into the employment relation. Neither is there an impropriety in a union insisting in the obedience of any of the provisions of its collective contract.

The correctness of these conclusions is emphasized by still another provision of the collective contract. As we have previously stated, the employer has agreed that he would not, by contract or otherwise, put himself in a position where he violates any of the terms of the collective bargain. Haystad and Jensen, by this provision, *had a duty to determine prior to the delivery of the doors that such were union made*, or at least the doors and *the contract which they executed for obtaining the doors was in conformity to the promises and agreement of Haystad and Jensen not to take any action which would put them in a position to violate the contract's provisions.* To hold that a union, charged with the representation of employees, could not compel the contracting employer to obey [illegible] contract is foreign to any legal concept.

The plain fact is that a union would have been derelict in its duty to the persons it represents not to have com-

pletely informed its membership as to every clause in its collective agreement.

When Fleisher appealed to Steinert to stop the hanging of the doors, he was, manifestly, appealing to management to obey the contractual provisions. The fact that the working rules of Respondent Council and the restrictive provision of the contract were almost identical in terms with respect to work on non-union goods does not alter the proper conclusion that the union was not acting contrary to the statute when Fleisher made his appeal to Steinert. The Board argues that Fleisher did not mention the contract provisions when he spoke to Steinert, and that appears to be a fact. But the fact is also clear that he did not mention the working rules either. Persuasive authority has held that working rules standing alone do not amount to statutory violations. (*Joliet Contractors Ass'n v. N.L.R.B., supra.*) That court held that the rule *may* furnish the inducement or encouragement for a strike or concerted refusal to perform services, but at least, until they have been shown by evidence to have done so, they are not contaminated with illegality. In this case, there is no evidence that the working rules were the motivating factor which resulted in the difficulty concerning the doors. A contrary conclusion without evidentiary support is a nullity.

We are not unmindful that in the struggle for existence, competition for markets becomes keen. We do know, however, of no rule which permits such competition to succeed by the inducement of violations of contracts of others in the competitive market. We suggest that the injection of Paine and Sand into a market for which they are not qualified is not afforded protection by the provisions of this statute. They must accept the mar-

ket as they find it and cannot complain because it has previously been contractually limited. This is especially true here where Haystad and Jensen have not only agreed not to require their employees to work on non-union materials, but where they have further agreed that they will not "by contract, or any means whatsoever, take any action that will prevent, or impede (them) in the full and complete performance of each and every term and condition" of the collective bargaining contract.

The Board argues, with some petulance, that 8(b)(4) was intended to protect neutral employers because they are embroiled in a dispute not their own. But, manifestly, when an employer or person seeks to inject their products into a market which has contractually been foreclosed to them, they cease to be neutral employers or persons and become not only directly involved, but are the prime motivation of the industrial dispute. By their actions, they seek and intend to promote breaches of collective compacts and to disrupt the tranquillity of previously stabilized industrial relations.

In dealing with the subject of 8(b)(4), the court below in the *Sound Shingle* case, quoted from the statements of Senator Taft, 93 Cong. Rec. 4198, in 2 Leg. Hist. L. M. R. A. 1107. A part of that quotation reads, *"If their conditions are not satisfactory, then it is perfectly lawful to encourage them to strike."* What could be more unsatisfactory conditions than where an employer and a union have agreed by contract not to require the workmen covered to handle non-union materials and then have that employer induced by a party foreign to the contract, to breach his agreement and to require his employees to handle non-union materials. In other words, Haystad and Jensen agreed to remove from the conditions of work

any requirement that their employees handle non-union materials. This was a working condition. In violation of the express provisions of their contract they unilaterally sought to require the handling of non-union materials until the union invoked its contract. Most certainly this sets up a situation visualized by Senator Taft, and one which the Senator stated that *"it is perfectly lawful to encourage them to strike."* This argument becomes more compelling when it is considered that Sand and Paine, through Sand, attempted to disrupt the lawful contractual relations between Haystad and Jensen and the union by the injection of their non-union materials. It is most difficult to conceive that in taking this action Sand and Paine could remain aloof from the inevitable results of their generating a labor dispute and still be termed neutrals.

Conclusion.

For the reasons stated, the judgment of the Court below should be reversed and the Board's order denied enforcement.

Respectfully submitted.

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APPENDIX.

Section 13 of the National Labor Relations Act, as amended, reads as follows:

> "Nothing in this Act, except as specifically provided herein, shall be construed so as to either interfere with or impede or diminish in any way the right to strike, or to effect the limitations or qualifications on that right."

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NOS. 127, 273 AND 324

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

CARPENTERS UNION, LOCAL 1976, AFL-CIO,
Petitioner
vs.
NATIONAL LABOR RELATIONS BOARD

NATIONAL LABOR RELATIONS BOARD, Petitioner
vs.
GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 886

LOCAL 850, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, Petitioner
vs.
NATIONAL LABOR RELATIONS BOARD

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE NINTH CIRCUIT AND FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE AFL-CIO AS AMICUS CURIAE

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE NINTH CIRCUIT AND FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE AFL-CIO AS AMICUS CURIAE

Interest of the AFL-CIO

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

This brief is submitted by the AFL-CIO because the issue involved in these cases is, as demonstrated in detail *infra* pp. 25-37, of substantial importance to a large number of international unions affiliated with the AFL-CIO.

It is the position of the AFL-CIO that when an employer has entered into a collective bargaining agreement which provides that his employees need not handle particular types of goods, a refusal by his employees to handle such goods is not a violation of Section 8(b)(4)(A) of the Act, even though the refusal to handle is union induced and is in disregard of the employer's instructions. Under such circumstances, there is neither a "strike" nor a "concerted refusal in the course of their employment" to handle goods; nor a "forcing or requiring" of any employer, as required by that section.

We believe that this conclusion is supported by the plain language and the legislative history of Section 8(b)(4)(A). By agreement with counsel for the unions which are parties to these cases, this brief is confined to this point; and to the prevalence of various types of "unfair goods" clauses in collective bargaining agreements, particularly in industries other than trucking.

SUMMARY OF ARGUMENT

I

The language of Section 8(b)(4)(A) is clear and unambiguous. There is a violation of that section only when a union induces or encourages the employees of any employer to engage in a strike or a concerted refusal in the course of their employment to perform the services for which they were employed; and only where the object of the strike or concerted refusal is to force or require any employer or other person to cease doing business with any other person.

Nothing in the language of Section 8(b)(4)(A) expressly outlaws a "struck goods" or "hot cargo" clause; the proscribed activity is union induced employee pressure on

their employer to force or require him to exert economic pressure against another employer. Thus, apart from this proscription, a union is free under that section to appeal to employers, employees, consumers and other elements of the public to support its position.

There is no need for an express qualification for cases in which the inducement is pursuant to a "hot cargo" clause or otherwise consented to by the employer, for it is implicit in the words "forcing or requiring" that the section is inapplicable where there is employer consent; those words connote an element of involuntarism or coercion.

Employee refusal to perform services when an employer has agreed to that course of conduct does not constitute a "strike" or "concerted refusal," even though the employer subsequently repudiates his contractual obligation. Moreover, an employee refusal to perform work which the employee and employer have contractually agreed should not be performed is not a "refusal in the course * * * employment" because the "course of employment" does not include such activity. There is no logical difference between permitting employees the right not to cross a picket line to perform services at a struck plant for their employer and permitting employees the right not to perform services for their employer on goods that pass through a picket line.

There is no merit in the Board's contentions that (1) the term "concerted refusal" was intended to cover employee refusals acquiesced in by the employer and (2) employer consent is of "no moment" because the inclusion of "or other person" in subparagraph (A) indicates that the interests of others are also to be safeguarded and cannot be obliterated without their consent. As to the former, both terms "strike" and "concerted refusal" were used simply to insure the section's applicability to situations in which something less than a work stoppage may occur. As to the latter, the legislative history of Section 8(b)(4)(A) indi-

cates that it was not enacted for the benefit of persons in addition to the secondary employer immediately involved.

Nowhere in the legislative history of Taft-Hartley is there any express mention made of the "hot cargo" agreement, as such, or any indication of an intent to proscribe the use of these agreements. Congress, if it had so desired, could have readily, by appropriate language, outlawed such agreements.

The Board's entire argument is based on the premise that the legislative history of Section 8(b)(4)(A) demonstrates Congress' desire to proscribe *all* secondary boycotts and, accordingly, to safeguard the interests of the public generally. Congress had no such desire; at most, it only intended to outlaw *some* secondary boycotts, i.e., "secondary boycotts * * * for specifically defined objectives," and to protect only innocent neutrals against strike action which would involve them in labor disputes in which they were not otherwise involved. For example, a secondary boycott that is not union induced is not prohibited, nor are those sanctioned by Sections 8(b)(4)(B) and (D). The wide area of permissible secondary boycott activity shows that Congress was not primarily concerned with safeguarding the interests of the general public. Congress was concerned, however, as the Congressional reports and debates demonstrate, with the involvement of innocent neutrals in labor disputes that do not concern them.

"Hot cargo" agreements are not violative of section 8(b)(4)(A) or repugnant to "the policy of the statute." If they are, Congress has had ample opportunity to so indicate. Congress, however, has refused to take any action on proposals to outlaw such agreements.

II

Various types of unfair goods provisions are widely prevalent in collective bargaining agreements. A limited

survey conducted by the AFL-CIO Department of Research discloses more than half a million workers covered by some type of "struck goods" or "non-union" goods provision, in addition to workers covered by contracts negotiated by the Teamsters Union. This survey also reveals that such clauses have been negotiated by many different unions in a wide variety of industries, and that the clauses take a wide variety of forms.

The prevalence of such clauses and the variety of different forms they take is additional reason for concluding that had Congress wished to outlaw them it would have done so clearly and unequivocally.

ARGUMENT.

I

A Union-Induced Employee Refusal Pursuant to a "Hot Cargo" Clause, to Handle Good, Is Not in Violation of Section 8(b)(4)(A) Under the Plain Language and the Legislative History of that Section.

A. *The Language of Section 8(b)(4)(A).*

Section 8(b)(4) in relevant part reads as follows:

> "It shall be an unfair labor practice for a labor organization or its agents * * * to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer * * * or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * *."

"While the statute is by no means a model of draftsmanship" (*Printing Specialties & Paper Converters Union* v.

LeBaron, 171 F. 2d 331, 335 (CA9)), the language of Section 8(b)(4)(A) has been characterized by the Second Circuit as "clear" (*Milk Drivers & Dairy Employees* v. *N.L.R.B.*, 245 F. 2d 817, 820) and by the Seventh Circuit as "unambiguous" (*Joliet Contractors Assn.* v. *N.L.R.B.*, 202 F. 2d 606, 608).[1]

Even a casual reading of "the plain unambiguous language employed by Congress in enumerating the elements required to constitute a violation" (*Joliet Contractors Assn., supra*, at p. 612) makes it clear immediately that there is a violation of the section only when (1) a union induces or encourages the employees of any employer, (2) to engage in a strike or a concerted refusal in the course of their employment to perform the services for which employed, (3) where the object of the strike or concerted refusal is to force or require any employer or other person to cease doing business with any other person. Certainly there is nothing in the bare language of Section 8(b)(4)(A), or any other section of the Act, which expressly outlaws the "struck goods" or "hot cargo" clause. Manifestly, the proscribed activity is union induced employee pressure on their employer to force him to exert economic pressure against another employer.

The means prohibited are explicitly confined to engaging in an actual strike or to inducing employees to do so. A union is not forbidden to solicit the cooperation of the neutral employer by approaching him directly. *Schatte* v.

[1] "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislative undertook to give expression to its wishes" *United States* v. *American Trucking Associations*, 310 U.S. 534, 543. And, correlatively, "legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him" *Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607, 618.

International Alliance, 182 F. 2d 158, 165 (CA 9), certiorari denied, 340 U.S. 827. Similarly, a union may induce the customers of any employer to refrain from patronizing him. *N.L.R.B.* v. *Service Trade Chauffeurs*, 191 F. 2d 65, 68 (CA 2). Thus, as distinct from secondary pressure exerted through the medium of employees by an actual strike or its inducement, a union is free under Section 8(b)(4)(A) to prevail on employers, consumers, and other elements of the public at large to support its position.

Further, there is in the language of Section 8(b)(4)(A) no general prohibition against direct appeals to employees. The proscription therein relates solely to appeals to employees which are designed to have the employees take strike action with the object of "forcing or requiring" their employer to exert economic pressure on another. Thus, the question is whether an employer is "forced" or "required" when he is induced to comply with his contractual understanding not to handle "hot goods." We believe the Court of Appeals for the District of Columbia was correct in holding:

> "Nor can it be said that there was a 'forcing' or requiring of an employer to case doing business with another person, because the employer was only being compelled to live up to its own voluntary contract entered into in advance of the happening." (247 F. 2d at 74).

It is true, of course, as the Board's brief notes (p. 42, n. 35) "that the language contains no express qualification for cases in which the inducement is pursuant to a 'hot cargo' clause or otherwise consented to by the employer." The short answer is that there is no need for such a qualification, for it is implicit in the words "forcing or requiring" that the section is inapplicable to a situation in which there is employer consent. Those words, as commonly understood

and defined,[2] connote an element of involuntarism or coercion. As the Second Circuit stated in the *Milk Drivers & Dairy Employees case*, "there is no violation of § 8(b)(4) unless the union encourages the employees to *coerce* the secondary employer. Where the employees are encouraged only to exercise a valid contractual right to which the employer has agreed there is no coercion" (245 F. 2d at 820).

The National Labor Relations Board itself, until recently, held and urged the view that "there is nothing in the express provisions or underlying policy of Section 8(b)(4)(A) which prohibits an employer and a union from voluntarily including 'hot cargo' or 'struck work' provisions in their collective bargaining contracts, or from honoring these provisions" (*Rabouin* v. *N.L.R.B.*, 87 NLRB 972). Since the arguments formerly advanced by the Board itself aptly express the views we desire to urge here, we ask the Court's indulgence to quote at some length from the Board's brief (pp. 40-41) in the Second Circuit in *Rabouin d/b/a Conway's Express* v. *N.L.R.B.* (195 F. 2d 906):

> "As far as Section 8(b)(4)(A) is concerned, an employer is at liberty to refrain from dealing with any person he chooses. As part of this freedom of action, on the occasion of a dispute between a union and another person, the employer may defer to the wish of the union that he cease dealing with the union's antagonist. Many factors may influence the employer to accede to the union's request. He may desire to aid the union lest substandard employment terms at the struck plant introduce undesirable competitive prac-

[2] The Oxford Universal Dictionary, 3rd Edition, 1955, defines "force" and "require" as follows:

Force: to use violence to, to compel, to bring about by force or effort, to constrain by force, to overpower by force, to urge, compel to violent effort, to drive by force, impel, to lay stress upon, press home, to obtain or take by force, to win by violence, to enforce.

Require: to ask for authoritatively or imperiously, to demand, claim, insist on having; to demand as necessary or essential on general principles or in order to comply with some regulation.

tices resulting from lower labor costs; the union may grant him a concession on other issues in exchange for his assistance; he may feel that preservation of harmonious relations with the union is preferable to doing business with the struck employer; or he may be convinced of the rightness of the union's cause. Section 8(b)(4)(A) does not deprive the employer of the opportunity to order his business on the basis of considerations of this nature which the union may advance. Nor does it deprive the union of the right to urge these factors upon the employer, so long as the employer's consent is won by means short of an actual strike or the inducement of his employees to strike, which are the sole influences from which the employer is freed by Section 8(b)(4)(A). It is true that the result of the employer's concurrence in the request of the union is to introduce secondary pressure into the primary dispute, but Section 8(b)(4)(A) excludes such pressure only when it flows from an actual strike or its inducement. As the Board explained (P.A. 367a, n. 31), it does not proscribe 'employer-union cooperation' otherwise created.

"This 'employer-union cooperation' need not await the union's actual dispute with another before it may materialize. What employers may do at the time of the dispute, they may contract in advance to do. Thus, all that is involved in a 'hot cargo' or 'struck work' provision is an anticipatory formalization of the employer's conduct in future disputes between the contracting union and another. Nothing in Section 8(b)(4(A) prohibits such a voluntary commitment. It stands as the employer's affirmation of his position upon which the union and the employees may rely, at least until repudiated, in shaping their own conduct.

"* * * In the interim between entry into these agreements and the strike against Rabouin, there is no showing that any of the employers had repudiated their advance commitment. Therefore, the Union was entitled to assume that this remained the employers' position and to convey this information to the employees when they requested guidance as to whether to

handle Rabouin's goods. The resulting refusal of the employees to handle Rabouin's freight was thus in conformity with their understanding of the employers' concurrence in that course of conduct."

Employee refusal to perform services "in conformity with their understanding of the employers' concurrence in that course of conduct" cannot, we submit, constitute a "strike" or "concerted refusal" within the plain meaning of Section 8(b)(4)(A).[3] Moreover, a union induced employee "strike" or "concerted refusal" in reliance on a "struck work" contractual provision can hardly be swept within the ambit of Section 8(b)(4)(A) by a subsequent employer repudiation of his contractual obligation, for the "forcing or requiring", if indeed there be any under such circumstances, is not induced by or the result of employee pressure but caused by his own repudiation of his obligation under the contract. The language of Section 8(b)(4)(A) is plainly not designed to protect an employer against himself.

Finally, the employees' "strike" or "concerted refusal" must be one that is "in the course of their employment". Plainly, an employee refusal to perform work which the employee and employer have contractually agreed should not be performed is not a "refusal in the course of * * * employment." The "course of employment" simply does not include or contemplate such activity. And, unilateral

[3] As the Board's brief in the Second Circuit in the *Rabouin* case, *supra*, points out (p. 42):

> "A strike is the concerted withholding of labor to gain the employer's accession to a demand which he is resisting. It is the employees' cessation of 'work at their own volition because of the failure of the employer to meet their demands.' In this case, however, the employees' refusal to handle Rabouin's goods was not in opposition to their employer, not repudiated but acquiesced in throughout. Thus, the indispensable prerequisite of a strike—a demand which the employer resists and for which the strike is called—is missing. A refusal to work in which the employer concurs can hardly be called a strike against him."

repudiation by an employer of an agreement with respect thereto obviously cannot serve to bring such work within the "course of employment." If it could, a financially hard-pressed employer, subject to a "hot cargo" clause, might endeavor to establish business relations with a strike-bound plant, not with any real expectation of doing business with that plant but with the hope that his employees' refusal to perform the work would provide a basis for a civil suit under Section 303(b) of the Act.

If, as this Court has held, Section 8(b)(4)(A) "clearly enables contracting parties to embody in their contract a provision against requiring an employee to cross a picket line if they so agree" (*N.L.R.B.* v. *Rockaway News Supply Co.*, 345 U.S. 71, 80), then it seems equally clear that under the same section parties may agree that employees are not required to work on "struck goods." And, if it is argued that the proviso to Section 8(b)(4) protects the employee's right not to cross a picket line, then it can be argued with equal force and effect that Section 7 of the Act protects the employee's right to bargain with respect to the kind of work to be performed and the scope of his employment. We perceive no logical difference between permitting employees the right not to cross a picket line to perform services at a struck plant for their employer and permitting employees the right not to perform services for their employer on goods that pass through a picket line. Such goods are not normally handled "in the course of * * * employment" by union members, particularly those working under contracts which contain a "hot cargo" clause.*

* The brief *amicus* of the American Trucking Associations, Inc., states "that all that unions were forbidden from doing was to desist from causing employees who would normally handle certain commodities in the course of their employment duties to refuse to do so" (*id* at p. 23).

American Trucking Associations also argues that while parties are not prohibited from executing a contract which contemplates

Two contentions urged herein by the Board merit attention but not approval. First, the proposition is advanced that "there is persuasive evidence that Congress viewed the term 'concerted refusal' as covering employee refusals acquiesced in by the employer, adding the term 'strike' to insure that the ban on secondary boycotts would also reach employee refusals which the employer opposed," (Board's brief, p. 43). As argued above, there can be no "refusal" where an employer has agreed that certain work need not be performed. Both terms, "strike" and "concerted refusal" clearly imply employer opposition, and both terms were used simply to insure the section's applicability to situations in which something less than a work stoppage may occur. If Congress was concerned with "covering employee refusals acquiesced in by the employer," it could easily have done so by writing subsection (4) to read: "(4) to induce or encourage the employees of any employer to cease using, manufacturing, processing, transporting, or otherwise handling or working on any goods, articles, etc."

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the commission of a proscribed act, it cannot be inferred that such a contract is valid and enforceable or that its performance would be lawful (*id* at p. 15). This contention overlooks the fact that a "hot cargo" contract does not contemplate the commission of a proscribed act because the element of "forcing or requiring" in the prohibited act is missing. The examples cited e.g., 48 hour week at straight time rates, are not in point as the statutory requirements there involved contain no element of employer choice whereas in Section 8(b)(4)(A) an employer who voluntarily agrees to a "hot cargo" clause is not "forced" or "required" and consequently not within the applicable scope of the section. Accordingly, while "the prohibition against union inducement or encouragement of certain employee action makes no distinction between emloyees who have a legal right to engage in a work stoppage and those who do not" (*id* at pp. 15-16), the prohibition does make a distinction between strikes having the object of "forcing or requiring" employers and those which do not. It is thus a truly startling proposition that a union is a "tort feasor" (*id* at p. 19) even though no wrong is committed when an employer is not "forced" or "required."

In any event, the "persuasive evidence" to which the Board alludes to support its view not only is not part of the legislative history of Section 8(b)(4)(A) but indeed supports a contrary conclusion. The explanatory statement of Senator Ball (*id* at p. 45) makes it clear that the concerted refusal by the construction union was undertaken with the object of "forcing or requiring" the employer to acquiesce. Obviously, such union activity is proscribed, and an employer's subsequent acquiescence does not render action lawful that was unlawful when undertaken. But by no stretch of the imagination, we submit, does the illustration cited support the Board's view that the term "concerted refusal" covers employee refusals acquiesced in by the employer.

Second, the Board argues that employer consent is of "no moment" because the inclusion of "or other person" in subparagraph (A) indicates that the interests of others are also to be safeguarded and cannot be obliterated without their consent (*id* at pp. 37, 40). For the reasons urged in Point B, *infra*, we do not think that the evidence is "compelling," as the Board contends, that Section 8(b)(4)(A) and (B) was enacted for the benefit of persons in addition to the secondary employer immediately involved. Suffice it to say, we think the term "or other person" is a broad term to include others, such as salesmen, office personnel or subcontractors, who are directly "forced" or "required" by "a strike or a concerted refusal." Otherwise, if the Board's view is correct, a secondary boycott which is legal under Section 8(b)(4)(B) would be rendered unlawful under Section 8(b)(4)(A) because some "other person" has been adversely affected—an obviously absurd construction.

B. *The Legislative History of Section 8(b)(4)(A).*

To say the least, the legislative history of Section 8(b)(4)(A) is neither compelling nor clear as to its intended

scope,[5] which undoubtedly accounts for the Board's ability to rely on the same legislative history now to support its current views as it has in the past to support contrary views.

Admittedly, considerable mention was made, in general, in both the reports and debates, of secondary boycotts, jurisdictional strikes, sympathy strikes and of "horrible examples" of each.[6] But, strangely, and most significantly, nowhere in the legislative history of Taft-Hartley is there any express mention made of the "hot cargo" agreement, as such, or of the validity such agreements would have under the proposed proscriptions, or any indication of an intent to outlaw or proscribe the use of these agreements. The Board and supporters of its current view, of course,

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[5] The Second Circuit in the *Milk Drivers* case (245 F. 2d 817) relied on the "clear" language of Section 8(b)-(4)(A), stating at pp. 820-821:

> "Both the petitioners and the Board see in the legislative history some factors to support their respective positions. The Board points to the Congressional abhorrence of secondary boycotts, and the petitioners find indications that invocation of a hot cargo clause was not what the congressmen meant by secondary boycott. The Board stresses the interference with the public interest produced by any work stoppage and the petitioners point out that more recent efforts to get Congress to outlaw hot cargo clauses were defeated. We do not think such tangential legislative history authorizes us to go behind the clear language."

[6] During the course of debate, Senator Murray, a member of the Senate Committee on Labor and Public Welfare and an opponent of the bill observed:

> "I believe that all of my colleagues on the committee, and all others who have given serious thought to the problems of labor relations will agree that there are few issues that are more complicated and more illusive than those connected with secondary boycotts. Here we have a term, which is almost incapable of any precise definition, but which is one of those very dangerous loaded phrases which can be tossed around indiscriminately to stir the emotions and cloud the brain." (2 Legislative History 1366)

argue that Congress must have intended Section 8(b)(4)(A) to be applicable, regardless of such agreements, in view of Congress' awareness of the prevalence of such agreements in industry at the time of the enactment.

Apart from the possibility that Congress may not have desired to disrupt established labor-management practices in this area, the short answer is that Congress could readily, by appropriate language, have indicated its desire to outlaw "hot cargo" agreements.[7] "The idea which is now sought to be read into the [Act] * * * is not so complicated nor is English speech so poor that words were not easily available to express the idea or at least to suggest it" *Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607, 618.

The keystone of the bridge by which the Board attempts to avoid the plain language of Section 8(b)(4)(A) is that the legislative history of that section demonstrates "Congress' desire to proscribe *all* secondary boycotts" (emphasis supplied, Brief, p. 30) and, accordingly, to safeguard the interests of the public generally (*id* at p. 32). We believe that the structure must fall. Congress had no intention of going as far as the Board contends. Rather, keeping in mind that the Act is a "product of careful legislative drafting and compromise beyond which its protagonists either way could not force the main body of legislators" (*Rabouin* v. *N.L.R.B.*, 195 F. 2d 906, 912), it is evident that Congress intended, at most, to outlaw *some* secondary boycotts and to protect innocent neutrals, not the public generally, against strike action which would involve them in labor disputes in which they were not otherwise concerned.

From the very inception of the legislative process which culminated in the Taft-Hartley Act, the "shotgun" approach

[7] In 1941, a statute was enacted in California specifically outlawing "hot cargo" agreements (see *Ex Parte Blaney*, 184 P. 2d 892), and this statute was called to the attention of Subcommittee No. 3 of the House Judiciary Committee, 77th Cong., 2nd Sess., Serial No. 17, pp. 135-136.

for dealing with unfair labor practices was eschewed. There was no intent to ban *all* secondary boycotts, but, rather, an intention to confine the reach of 8(b)(4) to the narrow scope indicated by its language. The Senate Report states (S. Rep. No. 105, 80th Cong., 1st Sess., 1 Leg. Hist. 413-414):

> "Many and diverse proposals designed to define and correct those union practices which are properly the subject of Federal control, have been presented to the committee, by witnesses who appeared before us as well as by members of the committee. Both witnesses and committee members were in substantial accord that many union practices, especially secondary boycotts, jurisdictional disputes, violations of collective bargaining contracts, and strikes and boycotts against certifications of the National Labor Relations Board, should be subject to Federal regulation. With respect to other aspects of labor-management relations, there has been a considerable divergence of opinion as to the necessity for Federal regulation. Moreover, witnesses and committee members have made numerous suggestions as to the form in which legislative action to remedy unfair practices by unions should be cast.
>
> "After a careful consideration of the evidence and proposals before us, the committee has concluded that *five specific practices* by labor organizations and their agents, affecting commerce, *should be defined as unfair labor practices*. Because of the nature of certain of these practices, especially jurisdictional disputes and *secondary boycotts* and strikes *for specifically defined objectives*, the committee is convinced that additional procedures must be made available under the National Labor Relations Act in order adequately to protect the public welfare which is inextricably involved in labor disputes," (emphasis supplied)

Thus, it was not *all* secondary boycotts but only "secondary boycotts * * * for specifically defined objectives" that were proscribed. Accordingly, a secondary boycott that is not union induced is not prohibited, so that neutral employ-

ers are free to cease doing business with or handle the products of another employer when such action is voluntary or when it is brought about by any means other than coercion through actual strike action or inducement of a neutral's employees to strike.

Indeed, not even all union induced secondary boycotts were intended to be proscribed, as is evidenced by the careful wording of Sections 8(b)(4)(B) and (D)[8] which specifically sanction certain secondary boycotts. As explained by Senate Report No. 105, *supra:*

> "Paragraph (B) is intended to reach strikes and boycotts conducted for the purpose of forcing another employer to recognize or bargain with a labor organization that has not been certified as the exclusive representative. It is to be observed that the primary strike for recognition (without a Board certification) is not proscribed. *Moreover, strikes and boycotts for recognition are not made illegal if the union has been certified as the exclusive representative.* * * * *
>
> "Paragraph (D) deals with strikes or boycotts having as their purpose forcing any employer to assign work tasks to members of one union when he has assigned them to members of another union. However, *if the employer against whom the strike or boycott is directed is failing to conform to a determination of the Board fixing the representation of the employees performing the work tasks, then the strike or boycott is*

[8] Sections 8(b)(4)(B) and (D) provide as follows:

"(B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; * * * *

"(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: * * *"

not an unfair labor practice." (1 Leg. Hist. 428-429; emphasis supplied)

That this continued to be the meaning and scope of these sections throughout the entire legislative process is plainly evidenced by the statements in House Conference Rept. No. 510 (93 Cong. Rec. 6451; 1 Leg. Hist. 547-548) that under clause (B) "strikes and boycotts for recognition were not prohibited if the union had been certified as the exclusive representative," and under clause (D), "if the employer against whom the strike or boycott was directed was failing to conform to a determination of the Board fixing the representation of employees performing the work tests, then the strike or boycott was not an unfair labor practice."

That Congress was fully aware that it was acting in a limited area in proscribing strikes and boycotts is further evidenced by the statement in the House Conference Report, *supra* (1 Leg. Hist. 561), relative to the adoption of the procedure of Section 10(1) of the Senate amendment as follows:

> "Section 10(1) of the Senate amendment directed the Board to investigate forthwith any charge of unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8(b) of the conference agreement, which deals with *certain* boycotts and with *certain* strikes to force recognition of uncertified labor organizations and which has been discussed in connection with that section of the conference agreement." (emphasis supplied)

In view of the wide area of permissible, indeed authorized, secondary boycott activity, we fail to perceive the logic of the argument that in proscribing "certain boycotts" Congress was primarily concerned with safeguarding the

interests of the public generally.[9] The inference, rather, is that Congress had a limited objective. It was concerned not with safeguarding the interests of the public generally, but, as the court below correctly stated, with "the protection of those persons who might be subjected to a secondary boycott which is proscribed by the section" (247 F. 2d at 74).

This conclusion of the Circuit Court is substantiated by the indications of Congressional concern over the involuntary involvement of innocent neutrals in labor disputes that do not concern them at all, as the following excerpts from the Congressional reports and debates demonstrate:

> "* * * (13) 'Sympathy strike' (14) 'Illegal Boycott' and (15) 'Jurisdictional strike.' The activities that these three terms describe have in common the characteristic that they do not arise out of any dispute between an employer and employees who engage in the activities, or, in most cases, between the employer and any of his employees. More often than not the employers are powerless to comply with demands giving rise to the activities, and many times they and their employees as well are the helpless victims of quarrels that do not concern them at all." (House Report No. 245 on H.R. 3020, 1 Leg. Hist. 314).

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[9] That Congress appreciated it could not protect the interests of the public at large from the effects of labor strife without a wholesale restriction on strikes and boycotts is evidenced by the following remarks of Senator Murray (2 Leg. Hist. 1367):

> "There is no doubt that in an economy such as ours, in which specialization and interdependence are the keynotes, virtually any strike of any significance adversely affects the interests of third parties, many of whom are wholly innocent, and frequently wholly incapable of influencing the settlement of the dispute.
> * * * *
> "Certainly, therefore, the evil of the workers striking or refusing to handle in order to bring pressure upon some employer to cease dealing with another cannot be said to lie in the fact that innocent third parties are affected, unless we are willing to place a similar restriction on any strike which has a like effect."

• • • •

"Illegal boycotts take many forms. Often they are to compel employers to force their employees into unions or to give a union control over them as their bargaining agent in violation of the Labor Act itself. Sometimes they are direct restraints of trade, designed to compel people against whom they are engaged in to place their business with some other than those they are dealing with at the time, or *vice versa*." (House Report No. 245 on H.R. 3020, 1 Leg. Hist. 315)

In Senate Report No. 105 on S. 1126, supplemental views, p. 54 (1 Leg. Hist. 460), the following appears:

"There appears to be virtually no disagreement as to the complete injustice of secondary boycotts and jurisdictional strikes or as to the necessity of giving injured third parties a remedy against their operation. For the most part, it is the same employer, often with less than 50 employees, and the farmer or farm trucker who are the main victims of this type of racketeering union activity. *To a small storekeeper, or machine shop, picketed out of business by unions intervening between him and his employees,* or to the farmer prevented from unloading his perishable produce, the remedy of dealing with the NLRB is a weak reed." (emphasis supplied)

Representative Landis, a proponent of the bill, made the following remarks (93 Cong. Rec. A1296):

"*Secondary boycotts* engaged in by labor unions to force *a third party, not a party to a primary labor dispute, to force that party* to cease using the products of the employer engaged in the primary dispute is an activity which should be made illegal." (emphasis supplied)

During the course of debates, Senator Taft had occasion to note:

"I think the committee all agreed that those types of strikes [including secondary boycotts] are in effect racketeering strikes. They are strikes which are not direct strikes to settle questions of wages or hours or better working conditions. They are *strikes which are, in effect, attempts to bring indirect pressure on third*

parties, to get third parties to work in some way to bring about a result which may ultimately be favorable to the one initiating the pressure, which has no direct relation to the work except perhaps with regard to the question of power." (2 Leg. Hist. 1012; emphasis supplied)

* * * *

"The bill provides that that type of *strike* [secondary boycott] is an unfair labor practice: When a strike occurs, *the man who is* damaged by it is to go to the National Labor Relations Board and file a charge, and they give him a hearing." (2 Leg. Hist. 1013; emphasis supplied)

* * * *

"I do not quite understand the case which the Senator has put. This provision makes it unlawful to resort to a secondary boycott to *injure the business of a third person who is wholly unconcerned in the disagreement* between an employer and his employees."[10] (2 Leg. Hist. 1106; emphasis supplied)

* * * *

"Take a case in which the employer is getting along perfectly with his employees. They agree on wages. Wages and working conditions are satisfactory to both sides. Someone else says to those employees, 'We want you to strike against your employer because he happens to be handling some product which we do not like. We do not think it is made under proper conditions.' Of course if that sort of thing is encouraged there will be hundreds and thousands of strikes in the United States. *There is no reason that I can see why we should make it lawful for persons to incite workers to strike when they are perfectly satisfied with their conditions.* If their conditions are not satisfactory, then

[10] Note that Senator Taft did not say "businesses of third persons who are", which the Board seems to think was intended. See Board's brief, p. 32, n. 26. If the Board's view is correct, presumably an individual in the District of Columbia building a private dwelling which is not completed on schedule because of materials held up by an unlawful secondary boycott in the State of Washington could initiate a suit against the erring union—a result, we submit, which was never contemplated.

it is perfectly lawful to encourage them to strike." (93 Cong. Rec. 4323, 2 Leg. Hist. 1107; emphasis supplied)

* * * *

"I have heretofore cited the *typical case* of a secondary boycott, wherein the small businessman is practically put out of business because he is required to recognize, we will say, an AFL union, and a CIO union will not handle his goods. There are a number of cases of that kind in the record." (2 Leg. Hist. 1371; emphasis supplied)

And, finally, the House Conference Report points up the limited area of Congressional concern for the employer who is subjected to a secondary boycott. As the report states:

"Under clause (A) strikes or boycotts, or attempts to induce or encourage such action, were made unfair labor practices if the purpose was to force an employer or other person to cease using, selling, handling, transporting, or otherwise dealing, in the products of another, or to cease doing business with any other person. Thus *it was made an unfair labor practice for a union to engage in a strike against employer A for the purpose of forcing that employer to cease doing business with employer B. Similarly it would not be lawful for a union to boycott employer A because employer A uses or otherwise deals in the goods of or does business with employer B.*" (House Rept. No. 510, 80th Cong., 1st Sess., p. 43, 1 Leg. Hist. 547; emphasis supplied)

We think it manifest from the foregoing, as well as many other portions of the legislative history, that when Congress referred to the public's interest in regulating secondary boycott provisions, it was not speaking in terms of the public interest at large or in a vacuum, but as it was directly related to the specific activities under consideration.[11]

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[11] Quotations from the legislative history or from the Act itself, indicating that the Act was passed "in the public interest" prove nothing. All provisions of the Act were, of course, passed "in the public interest," but both language of Section 8(b)(4)(A) and its legislative history indicate that Congress deemed antithetical to the public interest only strikes against neutrals or inducements of neutrals to strike.

We think Congress said that as to secondary effects arising from labor disputes, it is in the public interest to protect the neutral or secondary employer, not a party to the labor dispute between the primary employer and his employees (or their representative), who is the unfortunate and helpless victim, involuntarily involved but adversely affected by the dispute. In short, "In an effort to narrow the area of industrial strife, and thus to safeguard the national interest in the free flow of commerce * * * [Section 8(b)(4)(A)] has in effect banned picketing when utilized to conscript in a given struggle the employees of an employer who is not himself a party to the dispute. Such we understand to be the purport of 8(b)(4)(A) of the Act." *Printing Specialties & Paper Converters Union* v. *LeBaron*, 171 F. 2d 331, 334 (CA 9).

Thwarted by the plain language and legislative history of Section 8(b)(4)(A), the Board and supporters of its current view that "hot cargo" agreements are invalid look for succor to "the policy of the statute". (Board's brief, pp. 53-54; American Trucking Associations' brief, pp. 29-34). But, as the Board pointed out in its brief in the *Rabouin* case in the Second Circuit, "where conduct sought to be condemned is not embraced within the statutory terms, it will not do to 'search for their equivalent in that circumambient aura, so often euphemistically described as 'the policy of the statute'.' Judge Learned Hand in *McComb v. Scerbo*, 177 F. 2nd 137, 141 (CA 2)." Specifically, the Board itself in its decision in the *Rabouin* case (87 NLRB 972) found "no merit" in the argument that "hot cargo" contracts "were repugnant to the policy of the amended Act * * * " (*id* at 982). And, in the *Milk Drivers* case, the Second Circuit did not "accept the argument that hot cargo clauses are against public policy", stating:

> "The advocates of this view ignore the statutory language to talk about 'secondary boycotts' and the undoubted Congressional dislike of them. Having assumed that refraining from work described in a hot

cargo clause is a 'secondary boycott' they frame the issue in terms of whether a hot cargo clause is a defense to a § 8(b)(4) unfair practice. We cannot agree with this characterization of the issue. There is no need for a 'defense' unless there has been a violation; and in determining the latter question we look to the statutory language, rather than the vague concept 'secondary boycott', about which the legislators sometimes talked, but which they did not write into the Act." (245 F. 2d at 822)

If, indeed, "hot cargo" agreements are violative of Section 8(b)(4)(A) or repugnant to the policy of the statute, Congress has had ample opportunity to so indicate. Employer spokesmen have repeatedly urged Congressional committees to amend the Taft-Hartley Act so as to invalidate "hot cargo" clauses but Congress has not done so. See American Trucking Association's brief *amicus*, pp. 6-7; testimony of Powell Groner before Senate Committee on Labor, Proposed Revision of Labor-Management Relations Act, 1947, pt. 1, 83rd Cong., 1st Sess., p. 166 (1953) and at the same hearings, Barden at p. 3022; Denham before House Committee on Education and Labor, Hearings on H. R. 115, 83rd Cong., 1st Sess., pt. 2, p. 395 (1953). In addition, in 1954, Senator Schoeppel of Kansas introduced a bill (S. 2989) to amend Section 8(b)(4)(A) for the purpose of specifically outlawing boycotts implemented through hot cargo clauses. After extended discussion (see Cong. Rec. for May 6, 1954, p. 579), the Senate refused to take action, despite the fact that at that time the Board was still adhering to its *Rabouin* decision. Subsequently, after the Board had ceased its adherence to *Rabouin*, Senator Curtis on May 14, 1956, introduced a new bill, S. 3842. After pointing out that the present statutory phraseology had not proven sufficient to cover all cases of secondary boycott and stating that "the present Board has adopted a more reasonable view of the matter", Senator Curtis went on to urge that "the problem is so important that it should not be left to the opinions of appointees to admin-

istrative office. Congress must speak once and for all in regard to the matter" (102 Cong. Rec. 8022). Congress has taken no action.

In these circumstance, the remarks of the Court in *United States* v. *International Boxing Club of N. Y.*, 348 U.S. 236 at p. 244, with respect to the significance of a similar legislative omission to amend the anti-trust laws are applicable:

> "* * * No further action was taken on any of the bills; Congress thus left intact the then existing coverage of the antitrust laws. Yet the defendants in the instant case are now asking this Court for precisely the same exemption which enactment of those bills would have afforded. Their remedy, if they are entitled to one, lies in further resort to Congress, as we have already stated. For we agree that 'Such a broad exemption could not be granted without substantially repealing the antitrust laws'."

II

Various Types of "Unfair Goods" Clauses Are Widely Prevalent In Collective Bargaining Agreements.

[This portion of this brief *amicus* was prepared, and the data for it assembled, by the AFL-CIO Department of Research.]

The economic brief submitted by the Teamsters Union cites historical studies and illustrative clauses from collective bargaining agreements negotiated in past years to demonstrate that provisions on refusal to handle struck or non-union goods ("hot cargo") have long been a part of American labor-management relations.

To obtain current information, the AFL-CIO Department of Research conducted a partial survey covering several dozen unions affiliated with the AFL-CIO to determine the general nature and extent of such provisions at this time.

The findings of this survey demonstrate (1) that such clauses are very widespread in existing American collec-

tive bargaining agreements, having been negotiated by many different unions in a wide range of industries, (2) that they cover a very substantial number of workers, and (3) that they take a wide variety of forms.

Even this limited survey found more than half a million workers covered by some type of "struck goods" or "non-union" goods provision (in addition to the number of workers covered by "hot cargo" provisions negotiated by the Teamsters Union).

The number of workers covered is particularly significant in light of the fact that the problem to which such clauses are directed does not readily arise in some types of industries. Thus, in some industries with continuous processes or integrated operations, the prospect of workers being called on to handle struck goods from another plant is fairly remote, so the question does not arise as a practical problem and unions there have not sought provisions to meet it.

There are many variations in the provisions on the handling of struck or non-union goods. In the basic variations, the company agrees that it will not handle such goods and/or that it will not require its employees to handle such goods and/or that refusal by employees to handle such goods will not be considered a violation of the agreement's no-strike provision and will not be subject to penalty.

These basic forms and the many variations in detail are reflected in the specific clauses cited in the following pages. (Not included in this brief survey are closely related provisions often found in labor-management agreements stating that workers may respect and need not cross picket lines.)

The unions covered in the survey are listed below, in alphabetical order, with (1) their estimates of the number of members covered by some type of struck work or non-union (unfair) goods provisions in their agreements, and (2) the texts of clauses from specific major current agree-

ments negotiated by the international or one of its local unions covering sizable numbers of workers. (Several clauses are quoted from agreements covering relatively small numbers of members where the clause offers a good illustration of a special variation.)

Automobile, Aircraft and Agricultural Implement Workers of America, United

Struck goods provisions appear in only a small proportion of the union's agreements. A random check discloses several dozen such agreements, primarily covering relatively small bargaining units. The two samples below cover 1000 or more employees each.

Clause from agreement with The Electric Auto-Lite Company, Toledo, Ohio, covering some 3200 workers:

> "The Management agrees that should a controversy arise in regard to materials, tools, etc., being brought into the plant from a strike-bound plant, settlement of such controversy shall be subject to negotiations between the Management and the Executive Shop Committee, and there shall be no stoppage of work while the negotiations for settlement are in progress."

Clause from agreement with Ainsworth Manufacturing Corporation, Detroit, Michigan, covering approximately 1000 workers:

> "The Corporation agrees not to take jobs belonging to another Corporation which is engaged in a current strike for the purpose of completing work on such jobs in the Corporation's plant. The employees shall not be penalized for refusing to handle such work."

Brewery, Flour, Cereal, Soft Drink and Distillery Workers, International Union of United

Some 11,000 employees are covered by clauses in 31 agreements of the union stating that the company will not handle struck goods. About 8000 workers are covered by provisions in 63 agreements stating that the company will not handle non-union goods. (About 2000 of these workers

in 16 of these agreements include both the struck goods and non-union goods provisions.)

Clause from agreement with Milwaukee, Wisconsin, brewing companies (Blatz, Gettelman, Miller, Pabst, Schlitz), covering more than 7000 workers:

> "Employees shall not be required or requested to handle or process barrels belonging to or bearing the markings of a Brewer whose employees are on strike."

Clause from agreement with Carling Brewing Company, Belleville, Illinois, covering more than 500 employees:

> "Only Union Made malt shall be used. The employees covered by this agreement shall not be required to handle nor shall it be a violation of this agreement for them to refuse to handle any other malt or to handle or to process beer made with any other malt. Other Union Made material shall be given preference, provided price, quality and general conditions are equal."

Chemical Workers Union, International

Clause from agreement with Lever Brothers Company:

> "The Company will not accept sub-contracts from any other business firm the employees of which are represented by the International Chemical Workers' Union, AFL-CIO, and who are on authorized strike against the said Company. This provision, however, shall not be construed to require the Company to breach any contracts arrived at prior to any such strike."

Clothing Workers of America, Amalgamated

Many of the union's agreements in the men's cotton garment industry contain struck work clauses. They cover more than 30,000 workers.

Clauses from standard agreements in cotton garment industry:

> "Members of the Union shall not be required to work on any merchandise which is intended for any manufacturing firm with whom the Union has a labor dispute. It shall not be considered a breach of this agreement on the part of the Union or on the part of any

individual employee if any employee or employees refuse to cross a picket line authorized by the Union establishing it, either of their own volition or by direction of the Union, nor shall such refusal be cause for discharge or discipline."

"The Employer shall not send work to a contractor with whom the Union has a labor dispute. Nor shall the Employer work in behalf of another manufacturer or contractor with whom the Union has a labor dispute."

"Employees shall not be required to work on merchandise intended for a firm with whom the Union has a labor dispute."

Garment Workers Union, International Ladies'

Provisions on struck goods, on handling of non-union goods, and use of non-union contractors are normally included in the union's major agreements.

Clause in standard agreements in the Northeast, Eastern Out-of-Town, Cloak Out-of-Town, Upper South, Southeast and Florida Regions:

"The employer shall not perform any work for or give any work to any concern against which a strike has been declared, and in no event shall it request any of its employees to perform work destined directly or indirectly for such concern. Such work shall not be deemed in the workers' regular course of employment, and the workers need not perform such work."

Clause in agreement with the California Sportswear and Dress Association:

"Members of the Association who cause to be manufactured shoulder pads, belts, embroidery, covered buttons, pleating and tucking on garments, etc. shall deal only with such firms as are in contractual relations with the Union."

Hatters, Cap and Millinery Workers International Union United

Approximately 40 of the union's agreements, covering an estimated 5000 workers, contain struck goods clauses.

Clause in 16 agreements covering 1000 workers:

"The Employer agrees that it will not sell to nor purchase from nor do work for any other employer whose employees are on strike or with whom the Union has a labor dispute until such strike or labor dispute in each case has been fully settled.

"No employee shall be required or requested by the Employer to perform any work for any other employer whom the Union has declared to be unfair or with whom the Union has a labor dispute; performance of such work shall not be deemed in the regular course of the employee's employment and refusal to perform such work shall not be deemed a breach of this agreement."

Clause in agreement with New York associations of cap makers, covering 2000 workers:

"The Employer agrees that he will not work for, perform any work for, or supply any merchandise to, any manufacturer or jobber during pendency of a stoppage or strike declared by the Union, or its parent body, the United Hatters, Cap and Millinery Workers International Union, against such manufacturer or jobber. The Employer agrees that he will not require his workers to work on any work to be performed for, or merchandise to be supplied to, any such manufacturer or jobber. The Union may direct the employees of the Employer to cease their work either individually or collectively at any time that the Employer fails to observe the provisions of this clause in absolute good faith, and such cessation of work, whether individually or collectively, shall not be deemed to be a breach of this agreement on the part of the Union or of the workers."

Lithographers of America, Amalgamated

Struck work clauses have been negotiated in 94 percent of the union's agreements in the United States and cover over 29,000 workers, or 93 percent of the union's membership. Some 87 percent of the union's agreements, covering about 27,500 members, contain a "trade shop" clause on the handling of work made by other than the union's members.

Standard clause on struck work:

"The parties agree that the employees will not be required to execute work (other than work actually in process in its plant) received from or destined for any lithographic employer or lithographic plant, or any lithographic work previously and regularly produced by such employer or in any such plant, with whom the Amalgamated Lithographers of America has a dispute, of which the Company has been advised by the Union in writing. Furthermore, in the event an employer shall execute any such work, in whole or in part, then the Union shall be entitled in its discretion to terminate this agreement forthwith by notice in writing."

Standard "trade shop" clause on non-union work:

"It is agreed that employees will not be required to use any lithographic production work made in any shop which was not under contract with the Amalgamated Lithographers of America. Furthermore, in the event the employer uses any such work in its plant, then the Union may in its discretion terminate this agreement as to such employment forthwith by notice in writing."

Machinists, International Association of

More than 100 of the union's agreements contain struck work clauses.

Clause from agreement with Cutler-Hammer, Inc., Milwaukee, Wisconsin, covering 3360 workers:

"The Company shall not require the members of the Union to work on material emanating from plants in which there is a labor controversy."

Clause from agreement with A.C.F. Industries, Inc., Albuquerque, New Mexico, covering 775 employees:

"The Company will not require the Employees to use, process, transport, or work on legally struck goods. The individual or concerted refusal to work on legally struck goods shall not constitute grounds for discipline, discharge or lay-off.

"Legally struck goods for this Article shall be considered to be only those items which the Company, during

a legal strike at another facility, may undertake to finish or to produce at the request of the struck company or the AEC for the duration of the strike only, which are not items of regularly scheduled production for this plant.

"Concerted refusal to work on legally struck goods shall not constitute a work stoppage or strike within the meaning of this Agreement.

"The Company will not require the Employees to cross any legal picket line established on or in front of the premises by a Bargaining Agent which has been certified to represent any Employees of the Company. The individual or concerted refusal to pass such legal picket line shall not constitute grounds for discipline, discharge or lay-off."

Marine and Shipbuilding Workers of America, Industrial Union of

Some form of struck goods provision has been negotiated in practically all of the union's major agreements, covering some 40,000 workers.

Clause from agreement with Bethlehem Steel Company, Shipbuilding Division, Atlantic Coast Yards, covering 15,000 to 20,000 workers:

"provided, however, that the Company shall not require any Employee to enter and do any work in any shipyard (other than one of the Yards) in which a strike shall be in progress."

Clause in agreement with Maryland Shipbuilding & Drydock Company, Baltimore, Maryland, covering approximately 3500 workers:

"The Company will not require any employee to work on a ship moved from a shipyard which is on strike."

Meat Cutters and Butcher Workmen of North America, Amalgamated

Provisions on handling of "unfair" goods have been negotiated in more than 20 agreements covering more than 18,000 workers in the retail meat field.

Clause from agreement covering retail markets in California, covering 16,750 workers:

"A. The Local Union shall have sole jurisdiction over its members insofar as the handling of unfair products are concerned, and in the event of one or more products being declared unfair, that three (3) days or seventy-two (72) hours notice in advance of such action on the part of the Union shall be served in written or verbal form upon the Employer or his duly appointed representative and the Local Union agrees that no action shall be taken against more than one national packer and one independent packer and one company of each of the other industries at any one time.

"B. The Union agrees that its members shall not discriminate against merchandise on hand in the Employer's market during the three (3) days of seventy-two (72) hours' notice given by a duly authorized representative of Local 551 that such merchandise is unfair."

Packinghouse Workers of America, United

Clause from agreement with John Morrell & Company, plants at four locations, covering 3500 to 4000 workers:

"In the event of a strike in other meat packing plants the Company shall not request any of its employees to kill, cut, or process any products for and in behalf of any such plant at which a strike is in progress, unless otherwise agreed to by the Union."

Clause in agreement with Columbia Packing Company, Boston, Massachusetts, covering 250 workers:

"The Company agrees that it will not receive, process or handle in any way or sell, or deliver any livestock, products or materials which have come from or been manufactured, processed, transported, storaged, or handled or serviced in any way by or which are to be delivered to, transported, storaged, processed, or serviced or handled in any way by any individual firm, partnership or corporation which is involved in a labor dispute with a bona fide labor organization. The Company will not request or direct any Employee

in the bargaining unit to perform any work on or with respect to, or handle or treat with any such livestock, products or materials and a failure or refusal of any Employee to do so shall not be grounds for discharge, discipline or penalty of any kind."

Printing Pressmen's and Assistants' Union of North America, International

Some 95 percent of the union's agreements in newspaper and commercial printing have struck work clauses. More than one-half of its agreements in specialty printing contain such clause. Over 90,000 workers are covered by these clauses.

Standard clause in union's agreements:

"Insofar as the application of this provision may be lawful, the Union reserves the right to refuse to execute any struck work received from or destined to any unfair employing printer or publisher, including all instances where a strike or lockout exists, which involves members of the International Printing Pressmen and Assistants' Union of North America."

Shoe Workers of America, United

About 40 percent of the union's agreements, covering approximately 20,000 of its members, contain some restriction on the handling of goods coming from or going to factories which are on strike.

Clause in agreements in State of Massachusetts, covering about 10,000 members:

"No member of the Union shall be required to work on shoes coming from a factory, factories, or houses where a strike or lockout or labor controversy exists insofar as this provision is in accordance with and in conformity to law."

Clause in agreements in States of Maine and New Hampshire, covering about 8000 members:

"No members of the Union shall be required to work on shoes coming from a factory, factories, or houses where an authorized strike or a lockout or a bona fide labor controversy exists, nor shall such members be

required to work on component parts coming from a factory, factories or houses where a strike exists in which the United Shoe Workers of America are a party."

Textile Workers Union of America

About 400 of the union's agreements, covering about 15,000 workers, contain a clause on struck or non-union materials.

Clause in standard agreement of major branch of the dyeing and finishing industry in the New York-Metropolitan area, covering some 130 plants employing about 10,000 workers:

"1. The Employer hereby covenants and agrees so far as it is lawful, for it to do so, that it will not print, finish, bleach, process, or work on:

"(a) Goods that do not bear the union label referred to above, or

"(b) Goods which in whole or in part come from or are destined for an Employer in whose plant the Union has authorized a strike or has declared is being operated under substandard or unfair labor conditions, or

"(c) Goods of a person, firm or corporation who is transferring goods to a plant in which the Union has authorized a strike or which it has declared is being operated under substandard or unfair labor conditions.

"2. Irrespective of any limitation on qualification contained in subsection 1 of this Section XXVII and as a separate and independent covenant and agreement, the Employers hereby covenants and agrees that under no circumstances or conditions will it request or require its employees or any of them to perform any labor, work or services, directly or indirectly upon:

"(a) Goods that do not bear the union label referred to in Section XXVI, or

"(b) Goods which in whole or in part come from or are destined for an employer in whose plant the Union has authorized a strike, or which the Union has declared is being operated under substandard or unfair labor conditions, or

"(c) Goods of a person, firm or corporation who is transferring goods to a plant in which the union has declared is being operated under substandard or unfair labor conditions; and it is covenanted and agreed by the Employer that the failure and refusal of its employees to work on such goods shall not constitute a breach of this Agreement."

Typographical Union, International

All agreements approved by the international union contain struck work clauses. These cover some 75,000 workers.

Standard clause in agreements is substantially as follows:

"(The employer) agrees not to require employees covered by this agreement to execute work received from or destined for a job shop or newspaper composing room in which an authorized strike by, or lockout of, a subordinate union of the ITU is in progress. The Union will give (the employer) forty eight hours notice in writing that a strike or lockout is in progress before the processing of materials may be stopped in accordance with the foregoing provisions."

All approved agreements also contain a clause stating that "the General Laws of the ITU, in effect January 1, ..., not in conflict with law or this contract, shall be observed on conditions not specifically enumerated herein". The provision of the General Laws dealing with this subject states:

"Subordinate unions at all times have the right to define as struck work composition and mailing room work executed wholly or in part by non-members, and composition, mailing room or other work coming from or destined for printing concerns which have been declared by the union to be unfair, after which union members may refuse to handle the work classified as struck work."

Woodworkers of America, International

About 10,000 workers are covered by struck work provisions negotiated by this union.

Clause in agreement with Weyerhaeuser Timber Company, covering about 8,000 workers:

> "The Employer agrees that the employees in his operation shall not be called upon to handle lumber products from operations that are on strike.
>
> "It is agreed that lumber that may be in transit or in the process of loading at the time strike is called shall not be considered unfair and the Union further agrees to furnish the Employer with a list of operations on strike."

Clause in agreement with International Paper Company, Long-Bell Division, covering about 2000 workers:

> " . . . At no time shall employees be required to act as strike breakers, go through picket lines or armed guards or handle products declared unfair by the plant employee members . . . "

CONCLUSION

For the reasons stated herein, and in the briefs for the Unions which are parties to these cases, it is respectfully submitted that unfair goods clauses are both valid and enforceable under the National Labor Relations Act.

Respectfully submitted,

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January 22, 1958

No. 999

In the Supreme Court of the United States

OCTOBER TERM, 1956

LOCAL 1976, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A. F. L.; LOS ANGELES COUNTY DISTRICT COUNCIL OF CARPENTERS; NATHAN FLEISHER, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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In the Supreme Court of the United States

OCTOBER TERM, 1956

NO. 999

LOCAL 1976, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A. F. L.; LOS ANGELES COUNTY DISTRICT COUNCIL OF CARPENTERS; NATHAN FLEISHER, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

The question presented is whether union inducement of employee refusals to work on nonunion goods, which would otherwise be proscribed as a secondary boycott by Section 8 (b) (4) (A) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), remains an unfair labor practice in spite of the fact that the employer and the union have agreed by contract that the employees "shall not be required to work on nonunion materials."

The Board believes that the decision of the court below, holding the union's actions illegal, is correct. However, the decision below, which accords with the views expressed by the Sixth Circuit in *National Labor Relations Board v. Local 11, United Brotherhood of Carpenters*, 242 F. 2d 932, is in direct conflict with the decisions of the Second and the District of Columbia Circuits in *Milk Drivers and Dairy Local Union No. 338, et al.* v. *National Labor Relations Board* (C. A. 2), decided June 19, 1957, 40 LRRM 2279, and *General Drivers, Local No. 886* v. *National Labor Relations Board* (C. A. D. C.), decided May 9, 1957, 40 LRRM 2047. Concurrently with this memorandum, the Government is filing a petition for certiorari in the *General Drivers* case and has under consideration the advisability of filing a petition in the *Milk Drivers* case.

The question presented is of major importance in the administration of the Act. The kind of contract clause involved in these cases, popularly termed a "hot cargo" clause, is widely used, and the conclusion that such a clause provides a valid defense to a Section 8 (b) (4) (A) violation would have the effect of insulating from the regulatory control of the Act a substantial amount of secondary boycott activity. The problems involved are more fully discussed in the Board's petition in the *General Drivers* case, to which the Court is respectfully referred.

Accordingly, the Government does not oppose the granting of the petition for certiorari in this case.

Respectfully submitted.

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JULY 1957.

No. 127

In the Supreme Court of the United States

OCTOBER TERM, 1957

LOCAL 1976, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A.F.L.; LOS ANGELES COUNTY DISTRICT COUNCIL OF CARPENTERS; NATHAN FLEISHER, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 127

LOCAL 1976, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A.F.L.; LOS ANGELES COUNTY DISTRICT COUNCIL OF CARPENTERS; NATHAN FLEISHER, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below (R. 208–223) is reported at 241 F. 2d 147. The findings of fact, conclusions of law, and order of the Board (R. 48–81) are reported at 113 NLRB 1210.

JURISDICTION

The judgment of the court below (R. 223–226) was entered on March 20, 1957. The writ of certiorari was granted on October 14, 1957 (R. 227). The jurisdiction of this Court rests on 28 U. S. C. 1254 and

Section 10 (e) of the National Labor Relations Act, as amended, 61 Stat. 147, 29 U. S. C. 160 (e).

STATUTE INVOLVED

The principal provision involved is Section 8 (b) (4) (A) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), which reads as follows:[1]

> SEC. 8 (b). It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * * *
>
> (4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * *

QUESTION PRESENTED.

Whether union inducement of employee refusals to work on nonunion goods, which would otherwise be proscribed as a secondary boycott by Section 8 (b)

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[1] Other relevant provisions of the Act are set forth in Appendix A to the Board's brief in the companion cases, Nos. 273 and 324, which present the same issue as that involved here.

(4) (A) of the National Labor Relations Act, as amended, is lawful because the employer and the union here agreed by contract that the employees "shall not be required to work on nonunion materials."[2]

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

The unfair labor practices found by the Board arose out of petitioners' inducement of employees of Havstad and Jensen to refuse to handle doors at the construction site of the White Memorial Hospital, in Los Angeles, California. Havstad and Jensen were engaged by the College of Medical Evangelists, a religious organization, as the general contractor for the construction of the hospital and other buildings on the college campus (R. 17; 124–125, 187–188). The doors in question were manufactured by Paine Lumber Company of Oshkosh, Wisconsin, and were obtained by Havstad and Jensen from Watson and Dreps, millwork contractors in Los Angeles. Watson and Dreps, in turn, had purchased the doors from Sand Door and Plywood Company, which is engaged in the wholesale jobbing of plywood doors and allied building materials in the Los Angeles area and is the exclusive Southern California distributor for Paine (R. 16–17; 169–171, 173–174, 184–185).

In 1953, the value of shipments of materials, including doors, from Paine in Wisconsin to Sand Door

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[2] This corresponds to the third question set forth in petitioners' brief. The first two questions set forth there (Br. 2) were not presented in the petition for certiorari (see Pet. 2) and are not properly before the Court. *Irvine* v. *California*, 347 U. S. 128, 129–130; *Mazer* v. *Stein*, 347 U. S. 201, 208, n. 6.

in California, amounted to $185,796.84, and from January 1, 1954, through September 8, 1954, such shipments amounted to $103,503.05 (R. 17; 172–173). The doors here involved have a value of $9,148.32. They were received by Sand Door from Paine early in August 1954, whereupon Sand Door notified Watson and Dreps, who picked them up and delivered them to the construction site by August 17 (R. 18; 173–175, 185, 198).

On August 17, 1954, the Paine doors having been delivered to the construction site, Haystad and Jensen's carpenter foreman, Steinert, in accordance with instructions from Superintendent Nicholson, assigned laborers to distribute the doors from floor to floor, and directed carpenter Sam Agronovich to start hanging the doors (R. 18; 110–112, 163–165). Later that morning, Nathan Fleisher, business agent of petitioner Local 1976, came to the building site and told Steinert that the men would have to stop hanging the doors, which did not have a United Brotherhood of Carpenters' label, until it was determined whether or not they were union doors (R. 18, 52–53; 165–166).

Steinert, as was required of carpenter foremen under petitioner District Council's By-Laws and Trade Rules, was a member of a constituent local of the District Council, petitioner Local 1976 (R. 53; 199, 162–163). As a foreman member of the Union, he had the responsibility for enforcing the District Council's By-Laws and Trade Rules, including the rule barring union members from handling nonunion materials (R. 53; 199). Accordingly, upon receiving orders from Fleisher, Steinert immediately stopped

the employees from distributing the doors to the different floors (R. 53; 165). Then, accompanied by Fleisher, Steinert went to carpenter Sam Agronovich and told him to discontinue hanging the doors because they were not union made (R. 18, 53; 165–166).

About 11 a.m., James Nicholson, general superintendent of construction for Havstad and Jensen, arrived at the job site and learned that the doors were not being hung (R. 18–19; 106, 113–116). Nicholson walked up to Business Agent Fleisher, who was talking with Steinert and carpenter Finkelstein, and asked why he had stopped work on the doors (R. 19, 54; 116–118). Fleisher replied that he had "orders from the District Council that morning to stop them from hanging the doors" and that he "could have pulled them off yesterday but * * * waited until today" (R. 54; 117). At this point, carpenters Sam Agronovich and Saul Agronovich (who was also union steward) approached. Superintendent Nicholson told them that they might as well pick up their tools, but upon reconsideration told Steinert to assign them to other work (R. 19; 117–119).

On that day and the next, James Barron, vice president and general manager of Sand Door, had telephone conversations with Earl Thomas, a representative of petitioner District Council, who advised him that the Council had checked with a Carpenters' local in Wisconsin and found that the doors were not union made (R. 19; 175–180). Barron pointed out that Sand Door, Watson and Dreps, and Havstad and Jensen all hired union men and were therefore innocent bystanders, but Thomas insisted that they could

net permit the hanging of the nonunion doors and suggested that Sand Door had better cancel its orders with Paine and buy union doors (R. 19; 178–179). Barron also talked to Business Agent Fleisher, who told him that the doors did not have a union label and that they would have to be "cleared" before they could be hung (R. 19; 181–184). Emmett Jensen of Haystad and Jensen also talked to District Council Representative Thomas, who told him that, since it had been ascertained that the doors were nonunion, the carpenters would not be able to hang them (R. 19; 190–191).

Thereafter, on October 5, Superintendent Nicholson and Steinert asked each carpenter employee on the hospital job if he would be willing to hang the doors (R. 20; 120–121, 138–150, 166–167). Each of the carpenters replied, in substance, that he would not unless clearance was obtained from the Union (*ibid.*).

At the time of the foregoing events, there was in effect a labor agreement negotiated between petitioners' parent, United Brotherhood of Carpenters, and the Building Contractors' Association of Southern California, of which Haystad and Jensen were members. This agreement provided, *inter alia*, that "Workmen shall not be required to handle non-union material" (R. 17–23, 57; 203).

B. THE BOARD'S CONCLUSIONS AND ORDER

Upon the foregoing facts, the Board, with two members dissenting, held that petitioners, in violation of Section 8 (b) (4) (A) of the Act, had induced the employees of Haystad and Jensen to engage in a con-

certed refusal to install nonunion doors manufactured by Paine, with the objects of forcing Haystad and Jensen to cease using or handling Paine products and of forcing Saind Door to cease doing business with Paine (R. 48–80). In arriving at this conclusion, the Board rejected petitioners' contention that the inducement of these employees was privileged because of the provision, noted above, in the contract between the builders and the Union.

Two members of the Board majority were of the view that, irrespective "of the existence of a 'hot cargo' clause, any direct appeal to employees by a union to engage in a strike or concerted refusal to handle a product is proscribed by the Act when one of the objectives set forth in Section 8 (b) (4) (A) is present" (R. 62). The third member of the Board majority stated that the "hot cargo" clause could not serve as a defense to a violation of Section 8 (b) (4) (A) because such provision was contrary to the policy of the Act and thus void (R. 66–68).

The Board's order (R. 64–66) requires Local 1976 and the District Council and their agents, including petitioner Fleisher, to cease and desist from the unfair labor practices found and to post appropriate notices.

C. THE DECISION OF THE COURT BELOW

The court below enforced the Board's order (R. 207–223). Respecting petitioners' "hot cargo" clause defense, the court stated (R. 217):

> In our view, there was inducement to a concerted refusal in the statutory sense, not an-

> thorized by the contract between Havstad and Jensen and the Union. An employee may well remain free to decide, as a matter of business policy, whether he will accede to a union's boycott demands, or, if he has already agreed to do so, whether he will fulfill his agreement. An entirely different situation, however, is presented under § 8 (b) (4) (A) of the Act * * * when it is sought to influence the employer's decision by a work stoppage of his employees. Such a work stoppage, Congress has plainly declared, is unlawful, when an object—clearly present here—"is * * * forcing or requiring any employer * * * to cease using * * * the products of any other * * * manufacturer, or to cease doing business with any other person."

ARGUMENT

The question presented in this case is the same as that presented in the companion case, *National Labor Relations Board* v. *General Drivers, etc.*, No. 273, namely, whether union inducement of employees not to work on disfavored products, which would otherwise be proscribed by Section 8(b) (4) (A) of the Act, is lawful because the employer has, by a "hot cargo" clause in his contract with the union, consented in advance to the employees not handling such products.[1] It is the Board's position that the court

[1] However in No. 273, unlike here, the employer-parties to the "hot cargo" agreement were motor carriers subject to the Interstate Commerce Act. As indicated in the Board's brief in No. 273 (pp. 55–56), there are additional grounds for concluding that a "hot cargo" agreement is no defense where such carriers are involved. See, also, *Galveston Truck Line Corp.* v. *Ada Motor Lines, Inc.*, No. MC–C–1922, Interstate Commerce Commission, December 16, 1957.

below correctly answered this question in the negative, and we respectfully refer the Court to the Board's brief in No. 273 for a full statement of the supporting reasons.

Petitioners here make one contention which we have not previously treated. They contend (Br. 26–30) that a contract clause providing that employees shall not be required to work on nonunion goods is no different from a clause providing that the employees shall not be required to work under "unsafe conditions" or for less than a certain wage, *i. e.*, it describes the terms under which the employees shall be required to work for their employer. When the employer fails to abide by these terms, petitioners assert, the employees have a direct dispute with him, and thus any resultant work stoppage is "primary" activity outside the purview of Section 8 (b) (4) (A).

This contention is similar to the contention which the Court rejected in *National Labor Relations Board* v. *Denver Building and Construction Trades Council*, 341 U. S. 675. There, the union sought to justify the strike called against Doose and Lintner, a general contractor who had engaged a non-union subcontractor, on the ground that it had a primary dispute with Doose and Lintner for bringing a non-union subcontractor on to the project. The Court held that it is sufficient for purposes of Section 8 (b) (4) (A) if a cessation of business relations be *an* object, though not the sole object, of the union's conduct. It further concluded that, since the union's objective of making the job all-union could only be attained by getting Doose and

Lintner to break its contract with the subcontractor, the strike "must have included among its objects that of forcing Doose & Lintner to terminate that subcontract" (341 U. S. at 688). The Court therefore accepted the Board's finding that the strike was for an object proscribed by Section 8 (b) (4) (A).

So here, the Board has found that *an* object of enforcing the "hot goods" clause was to force Havstad and Jensen, the employer party to the agreement, and also Sam Door, the intermediate distributor who was not a party, to cease using or dealing in the products of Paine Lumber (R. 55–56, 64). This finding of secondary object is not open to question now (n. 2, p. 3, *supra*). Accordingly, it is immaterial that petitioners may also have had the object of inducing Havstad and Jensen to comply with contract terms. For, even if this object were assumed to be lawful, it does not eliminate the finding that there was an additional object, one violative of Section 8 (b) (4) (A).

Furthermore, it should be noted that a "hot cargo" clause cannot fairly be equated, as petitioners do (Br. 26–27), with contract provisions respecting safety conditions or rates of pay. The latter provisions may reasonably be viewed as pertaining to relations between the contracting employer and his employees, and any dispute relating to them as being of a "primary" nature. They cover matters which have an immediate and direct bearing on the employees' welfare, and over which their employer has effective control. The "hot cargo" clause, on the other hand, involves a commitment not to use a certain product, not because of any dispute over the product with the contracting em-

ployer; but because the union disfavors the labor conditions under which the product was manufactured by some other employer. The contracting employer is powerless to grant the union's ultimate demands, *e. g.*, unionization of the manufacturer's employees, and can aid its cause only by the indirect means of ceasing to use or handle the product. Indirect pressure of this kind is precisely what Section 8 (b) (4) (A) was intended to avoid. See Board Brief in No. 273, pp. 22–26. In short, a "hot cargo" clause, by its very nature, is focused upon the type of secondary object proscribed by Section 8 (b) (4) (A).[4]

[4] Indeed, petitioners appear to recognize that a "hot cargo" agreement is aimed at the producer of the disfavored product rather than at the contracting employer. They assert (Br. 29) that, "when an employer or person seeks to inject their products into a market which has contractually been foreclosed to them, they cease to be neutral employers or persons and become not only directly involved, *but are the prime motivation of the industrial dispute*" [emphasis added].

CONCLUSION

For the reasons stated above and in the Board's brief in No. 273, the judgment below should be affirmed.

Respectfully submitted,

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No. 273

In the Supreme Court of the United States

OCTOBER TERM, 1957

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 886, AFL–CIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. ——

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 886, AFL–CIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit, issued May 9, 1957, setting aside the Board order issued against respondent union.

OPINIONS BELOW

The opinion of the court below (Appendix, *infra*, pp. 10–22) is not yet reported. The findings of fact, conclusions of law, and order of the Board (R. 63–67, 26–61)[1] are reported at 115 N. L. R. B. 800.

JURISDICTION

The judgment of the court below (Appendix, *infra*, pp. 23–24) was entered on May 9, 1957, and its decree (Appendix, *infra*, pp. 24–27) issued on June 7, 1957.

[1] "R" references are to the Joint Appendix filed in the court below.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 and under Section 10 (e) of the National Labor Relations Act, as amended, 61 Stat. 147, 29 U. S. C. 160 (e).

QUESTION PRESENTED

Whether union inducement of employees not to handle or work on goods, which would otherwise be proscribed as a secondary boycott by Section 8 (b) (4) (A) of the National Labor Relations Act, as amended, is lawful because the employer and the union have agreed by contract that the employees shall not be required to handle "unfair goods."

STATUTE INVOLVED

The pertinent provision of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151 *et seq.*), is as follows:

> SEC. 8 (b). It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * * *
>
> (4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufac-

turer, or to cease doing business with any other person; * * *

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

On September 15, 1954, Local 850 of the International Association of Machinists, bargaining representative of the production and maintenance employees of the American Iron and Machine Works, called a strike at, and commenced to picket, the Company's three plants in Oklahoma City, Oklahoma (R. 31; 128–130). The picketing deterred the five trucking firms[2] normally servicing American Iron from making pick-ups and deliveries at its premises. Thereupon, American Iron hauled its freight in its own trucks to the Oklahoma City loading platforms of the trucking firms for shipment (R. 32; 118).

The Machinists followed the American Iron trucks to the premises of the carriers and picketed them while they remained there (R. 32; 124–125). In addition to engaging in such picketing activity, the Machinists expressly requested employees of the motor carriers not to handle American Iron freight (R. 37–40; 111, 123–124, 137, 159–160).

Respondent General Drivers, Local No. 886, hereafter called the Teamsters, was the collective bargaining representative of the employees of the motor car-

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[2] Santa Fe Trail Transportation Co.; Gillette Motor Transport; Time, Inc.; D. C. Hall Transportation Co.; and Lee Way Motor Freight Lines. These are common carriers for hire engaged in the interstate business of hauling freight by motor vehicle, under licenses from the Interstate Commerce Commission (R. 3, 9).

riers. Its contract with each of the carriers contained the following "hot cargo" clause (R. 41–42; 140, 187):

ARTICLE 4

* * * * *

(b) Members of the Union shall not be allowed to handle or haul freight to or from an unfair company, provided this is not a violation of the Labor Management Relations Act of 1947.

Invoking this clause, agents of the Teamsters directed the carriers' employees to cease handling American Iron freight. In each instance, except that involving the Lee Way Motor Freight Lines, the employer had ordered the employees to handle the freight, and in every instance the employees, after receiving instructions from the Union, refused to do so (R. 49–57).

B. THE BOARD'S CONCLUSIONS AND ORDER

The Board, with two members dissenting, concluded that the Teamsters' appeals to the carriers' employees not to handle American Iron freight were violative of Section 8 (b) (4) (A) of the Act, notwithstanding the "hot cargo" clause in the Teamsters' contracts with the carriers. Two members of the Board majority, adopting the view expressed in the earlier *Sand Door* case, 143 N. L. R. B. 1210,[3] held as follows (R. 64):

> As stated in the principal opinion in that case, regardless of the existence of a "hot cargo"

[3] Enforced, *sub nom. National Labor Relations Board* v. *Local 1976, United Brotherhood of Carpenters*, 241 F. 2d 147 (C. A. 9), petition for certiorari pending, No. 999, this Term.

> clause, any direct appeal by a union to engage in a strike or concerted refusal to handle a product is proscribed by the Act when one of the objectives set forth in Section 8 (b) (4) (A) is present. Thus, while Section 8 (b) (4) (A) does not forbid the execution of a hot cargo clause or a union's enforcement thereof by appeals to the employer to honor his contract, the Act does, in our opinion, preclude enforcement of such clause by appeals to employees, and this is so whether or not the employer acquiesces in the union's demand that the employees refuse to handle "hot" goods * * *

The third member of the Board majority held that the "hot cargo" clause served as no defense to a violation of Section 8 (b) (4) (A) because it was contrary to public policy (R. 67).

The Board, with two members dissenting, further concluded that the Machinists' picketing and allied activities at the carriers' docks were likewise violative of Section 8 (b) (4) (A). The Board rejected the Machinists' contentions that their activity at the docks was merely an incident of legitimate primary activity directed against American Iron, and that the activity was, in any event, lawful by virtue of the "hot cargo" clause in the Teamsters' contracts with the carriers (R. 65).

The Board entered an order requiring the Teamsters and the Machinists to cease and desist from the unfair labor practices found, and to post appropriate notices (R. 65–67).

C. THE DECISION OF THE COURT BELOW

The court below (with one judge dissenting on each part of the case) set aside the Board order against the respondent Teamsters and enforced the Board order against the Machinists (Appendix, *infra*, pp. 10–22). The court held that Section 8 (b) (4) (A) did not affect the validity of "hot cargo" agreements as such, and, accepting this premise, "it is hard to see how it can be said that, simply because the employees do what they have the right to do, there was a strike or refusal to work" (p. 13). Accordingly, the court concluded that the Teamsters' enforcement of their "hot cargo" agreements with the carriers by appeals to the carriers' employees was not in violation of Section 8 (b) (4) (A). However, the court further concluded that the Machinists' picketing and related activity at the carriers' docks was violative of Section 8 (b) (4) (A), for, since the Machinists was neither a party to, nor a third party beneficiary of, the Teamsters' contracts, these contracts could not make lawful the Machinists' secondary activities.

REASONS FOR GRANTING THE WRIT

1. The holding of the court below that Section 8 (b) (4) (A) of the Act, outlawing secondary boycotts, does not reach union appeals to employees not to handle a product where there is a "hot cargo" agreement between the union and the employer presents a question on which the Courts of Appeals are divided. The decision below is, on the one hand, in direct conflict with the holding of the Ninth Circuit in *National Labor Relations Board* v. *Local 1976, United Brother-*

hood of Carpenters, 241 F. 2d 147, and with the views expressed by the Sixth Circuit in *National Labor Relations Board* v. *Local 11, United Brotherhood of Carpenters*, 242 F. 2d 932 and, on the other hand, in accord with the holding of the Second Circuit in *Milk Drivers and Dairy Employees Local Union No. 338* v. *National Labor Relations Board*, decided June 19, 1957, 40 LRRM 2279. Cf. *Rabouin d/b/a Conway's Express* v. *National Labor Relations Board*, 195 F. 2d 906, 912 (C. A. 2). The union has filed a petition for certiorari in the *Local 1976* case, No. 999, this Term, and the Board does not oppose the granting of that petition. For this conflict to be fully resolved, it would appear appropriate for this Court to review the instant case also.

2. The question presented is of major importance in the administration of the Act. The kind of contract clause involved in this case, popularly termed a "hot cargo" clause, is extensively used in the labor-management field,[4] and the conclusion that such a clause provides a valid defense to a Section 8 (b) (4) (A) violation would have the effect of insulating from the regulatory control of the Act a substantial amount of secondary boycott activity.

3. The holding of the court below is erroneous. It rests on the premise that Section 8 (b) (4) (A) of the Act was enacted only for the benefit of the secondary employer whose employees have been induced by

[4] Collective Bargaining Negotiations and Contracts (Bureau of National Affairs, Washington, D. C.) pp. 77:5, 77:352–353; Collective Bargaining Provisions, Strikes and Lock-Outs; Contract Enforcement, Bulletin No. 903–13 (U. S. Dept. of Labor, 1949), pp. 37–43.

the union not to handle or work on the goods or commodities of another employer (pp. 14-15, *infra*). But the legislative history of the Act shows that the provision was enacted also for the protection of other employers and persons affected by a secondary boycott, including the public generally.[8] And this is confirmed by the language of Section 8 (b) (4) (A) itself, which defines the illegal object of picketing or strike activity proscribed therein in terms of "forcing or requiring * * * *any employer or other person* * * * to cease doing business with any other person." [Italics added.] It seems unlikely that Congress intended that the applicability of the Section should turn on whether the particular employer whose employees were induced did or did not have a "hot cargo" agreement with the union. To hold, as did the court below, that this employer's prior acquiescence makes a difference, is to fail to give full protection to the other interests sought to be safeguarded by the Section, without the consent of the persons affected. See *National Labor Relations Board* v. *Local 11, United Brotherhood of Carpenters*, 242 F. 2d 932, 936 (C. A. 6).

Nor is a different conclusion required, as the court below thought, by the language of Section 8 (b) (4) (A) which bans only two types of union inducement—inducing employees to "strike," or to engage in a "concerted refusal in the course of their employment" to

[8] See Leg. Hist. of the Labor-Management Relations Act, 1947 (Gov't Print. Off., 1948), pp. 414, 583, 1107-1108, 1354, 1375; *National Labor Relations Board* v. *Local 1976, United Brotherhood of Carpenters*, 241 F. 2d 147, 155 (C. A. 9); *National Labor Relations Board* v. *Local 11, United Brotherhood of Carpenters*, 242 F. 2d 932, 936 (C. A. 6).

handle goods. In the light of the broad purpose of the Section, the terms "strike" and "concerted refusal" should be construed to cover any union induced employee refusal to work, irrespective of the prior acquiescence of the employer. Moreover, the phrase "in the course of employment" is not properly to be interpreted as a reference to the work tasks which the employer has hired his employees to perform since, if so used, the parties could give legality to many acts forbidden by the statute by the device of fixing the scope of employment. See *Local 11, supra*, 242 F.2d 932, 936 (C. A. 6); Judge Prettyman's dissenting opinion herein, p. 20, *infra*.[6]

CONCLUSION

For the reasons stated, this petition for certiorari should be granted.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

JEROME D. FENTON,
General Counsel,
STEPHEN LEONARD,
Associate General Counsel,
DOMINICK L. MANOLI,
Assistant General Counsel,
NORTON J. COME,
Attorney,
National Labor Relations Board.

JULY 1957.

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[6] Congress "used this phrase only to distinguish between employees in their capacity as employees and employees in their capacity as consumers." *Local 1976, United Brotherhood of Carpenters (Sand Door)*, 113 N. L. R. B. 1210, 1217.

APPENDIX

1. *Opinion of Court of Appeals*

United States Court of Appeals for the District of Columbia Circuit

No. 13394

GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 886, AFL–CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

No. 13406

LOCAL 850, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL–CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITIONS TO REVIEW AND SET ASIDE, AND ON REQUEST FOR ENFORCEMENT OF, AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Decided May 9, 1957

Before PRETTYMAN, WASHINGTON and BASTIAN, Circuit Judges

BASTIAN, Circuit Judge: These cases involve the issue as to whether or not the so-called "hot cargo" clause[1] in a labor contract, wherein an employer

[1] The "hot cargo" clause in question reads: "(a) The Union and the Employer agree that it shall not constitute a breach of this Agreement for any employee or Union member cov-

agrees that his employees shall not be required to handle struck goods, is enforceable by the union party thereto, and whether it (the hot cargo clause) may be used as an excuse by a union on strike to conduct secondary picketing.

The facts found by the Trial Examiner and the majority of the National Labor Relations Board are substantially as follows:

Local 850, International Association of Machinists (hereinafter called Machinists) became involved in an economic strike with the American Iron & Machine Works Company (hereinafter called American Iron) in September 1954. The strike lasted a little over a month, terminating upon the execution of a new collective bargaining agreement. During the course of the strike the Machinists picketed the three plants of their employer. They also picketed trucks of American Iron when they appeared at the loading platforms of certain carriers. Representatives of General Drivers, Chauffeurs, Warehousemen and Helpers Union, Local 886 (hereinafter called Teamsters) instructed the unloading personnel of the carriers that, under the terms of the hot cargo clause of the contract between Teamsters and the carriers, the employees were not to handle American Iron goods since they were struck goods. Certain of the carriers, despite the hot cargo clause, requested their employees to handle American Iron goods, whereupon Teamsters urged its members employed by those carriers to refuse to handle these goods. One carrier-

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ered herein to refuse to cross a picket line or to refuse to enter upon the premises of an Employer if such refusal does not constitute a violation of the Labor Management Relations Act of 1947. (b) Members of the Union shall not be allowed to handle or haul freight to or from an unfair company, provided, this is not a violation of the Labor Management Relations Act of 1947."

employer took no action and did not request his employees to unload.

On charges filed by American Iron, the National Labor Relations Board (hereinafter called the Board) issued complaints, filed two days after the new contract between American Iron and Teamsters was signed, against both Teamsters and Machinists by reason of the alleged violation of Section 8 (b) (4) (A) of the National Labor Relations Act, as amended.[2] A temporary injunction applied for by the Board was denied by the United States District Court for the Western District of Oklahoma.

The complaints of the Board were referred to a Trial Examiner and, after a preliminary report and consideration of the exceptions thereto, the Board, by a majority vote, two of the five members dissenting, directed that Machinists and Teamsters cease and desist from inducing or encouraging the employees of the carriers, or any other employer, to engage in a strike or concerted refusal in the course of their employment to work on or handle freight consigned to or received from American Iron, or any other employer, where an object thereof was to force or require

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[2] 61 Stat. 141 (1947): "(b) It shall be an unfair labor practice for a labor organization or its agents * * * (4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * *."

any employer or person to cease doing business with American Iron. Two of the three members of the majority of the Board were of opinion that the hot cargo clause was valid; the third member, concurring in the result of the Board's order, was of opinion that the clause was illegal and did violence to Section 8 (b) (4) (A). The two Board members comprising the majority held in effect that, even assuming that the Act itself does not prohibit the execution of a "hot cargo" clause, nevertheless, the Act does preclude enforcement of such a clause by appeals to employees.[3]

From the order of the Board, Teamsters and Machinists filed these petitions asking this court to review and set aside the order; and, in its answer to the petitions, the Board requested that its order be enforced.

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[3] The exact language of the Board's ruling is as follows: "* * * any direct appeal to employees by a union to engage in a strike or concerted refusal to handle a product is proscribed by the Act when one of the objectives set forth in Section 8 (b) (4) (A) is present. Thus, while Section 8 (b) (4) (A) does not forbid the execution of a hot cargo clause or a union's enforcement thereof by appeals to the employer to honor his contract, the Act does, in our opinion, preclude enforcement of such clause by appeals to employees, and this is so whether or not the employer acquiesces in the union's demand that the employees refuse to handle 'hot' goods. Accordingly, in affirming the Trial Examiner, we do not find it necessary to rely as he did, on the fact that the secondary employers herein did not acquiesce in the refusal of their employees to handle American Iron's freight. In our view, it is sufficient that there was direct inducement of such employees by Teamsters not to handle such freight, with an object of forcing the secondary employers to cease dealing with American Iron."

I

Appeal in No. 13,394

PETITION OF GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 886

We agree with the four members of the Board who held that the hot cargo clause of the contract was not violative of the provisions of Section 8 (b) (4) (A) of the Act. This seems also to have been held by the Second Circuit in the so-called Conway case.[4] The majority of the Board held, following *Sand Door & Plywood Co.*, 113 N. L. R. B. No. 123, that any direct appeal to employees by a union to engage in a strike or concerted refusal to handle a product is proscribed by the Act when one of the objectives set forth in Section 8 (b) (4) (A) is present. See note 3, *supra*. With this we disagree. If the hot cargo clause is not violative of Section 8 (b) (4) (A), and we think it is not, such a ruling would in practical effect render nugatory the clause itself and would leave the employees without adequate remedy. The Board urges that Section 8 (b) (4) (A) was enacted for the benefit of the public. We think that, although the public is

[4] *Rabouin* v. *National Labor Relations Board*, 195 F. 2d 906, 912 (2d Cir. 1952). There the court said: "The union cannot have committed an unfair labor practice under this section in regard to those employers who refused to handle Rabouin's shipments under the terms of the area agreement provision relating to cargo shipped by struck employers. Consent in advance to honor a hot cargo clause is not the product of the union's 'forcing or requiring any employer * * * to cease doing business with any other person.' § 8 (b) (4) (A)." See also *Meier & Pohlmann Furniture Co.* v. *Gibbons*, 233 F. 2d 296 (8th Cir. 1956), 113 F. Supp. 409 (1953); *Madden* v. *Local 442, etc.*, 114 F. Supp. 932 (W. D. Wis. 1953).

involved, this section has for its purpose the protection of those persons who might be subjected to a secondary boycott, which is proscribed by the section.

We are not impressed with the argument that other adequate remedies are open to the employees of the union. Such remedies as are suggested by the Board seem to us to be totally inadequate and not such as are contemplated by the agreement by the employer in the hot cargo clause.

Here the Teamster's conduct only consisted of urging the employees of the carriers not to handle freight from a company which they considered unfair. This was exactly what the carriers had agreed their employees would not be required to do. If an employer may lawfully agree that its employees will not be required to handle freight from a struck company, and such a situation arises, it is hard to see how it can be said that, simply because the employees do what they have the right to do, there was a strike or refusal to work. Nor can it be said that there was a "forcing" or requiring of an employer to cease doing business with another person, because the employer was only being compelled to live up to its own voluntary contract entered into in advance of the happening.

It cannot be argued that the actions of Teamsters constituted a sympathy strike or an illegal boycott. The actions taken might have been so regarded had there been no hot cargo clause. In sympathy strikes or illegal boycotts the employers are innocent victims of disputes with which they are not concerned. But where such a clause exists a different situation arises. The secondary employer has consented, knowingly and in advance, to the refusal of its employees to handle goods of the original employer.

It seems to us that the purpose of Section 8 (b) (4) (A) is to prevent injury to secondary employers in the

disputes of others in which the secondary employers are not involved, and to prevent the forcing of such employers to stop doing business with a third person. But, in cases like this one, the secondary employer has agreed, as part of its bargaining contract with its own union, not to handle goods of an unfair employer; and it would seem that Teamsters employed the only effective means in its power to enforce the agreement.

I am authorized to state that Circuit Judge Washington agrees with the foregoing treatment of No. 13394. He is filing an additional statement.

Circuit Judge Prettyman dissents for reasons which he will state separately.

The Board's order as to Teamsters will be set aside.

II

Appeal in No. 13406

Petition of Local 850, International Association of Machinists

Machinists urge a number of objections to the Board's findings and order. Among them is that the Board erred in not holding that Teamster's conduct was protected activity and, accordingly, Machinists' conduct in bringing the dispute to the knowledge of the members of the Teamsters' Union was not in violation of Section 8 (b) (4) (A).

Machinists were not parties to the contract between the carriers and Teamsters. But they contend that, since Teamsters and the carriers were parties to a contract containing the hot cargo clause, an essential element to a finding of violation of the Act is missing. Their position is that the handling of American Iron freight (struck goods) by the employees of the carriers was taken out of the scope of their employment

by the hot cargo clause and, therefore, Machinists could induce carrier employees to exercise their contract right not to handle struck goods. Machinists urge that, since Teamsters were free to honor Machinists' ambulatory picket line, their activity would not constitute encouragement or inducement of Teamsters to engage in a concerted refusal in the course of their employment to handle the goods of another employer.

We agree with the Trial Examiner and the Board majority that the conduct of Machinists must be evaluated independently of that of Teamsters and that the defenses available to Teamsters are not automatically available to Machinists. The latter are neither parties nor third party beneficiaries of the Teamsters-carrier contract.

The Trial Examiner and the Board majority found that after picketing of American Iron trucks began, while the trucks were on the premises of the carriers, dock employees of at least some of the carriers continued to handle American Iron products. Indeed, in some instances there were protests when supervisory employees attempted to move merchandise which would ordinarily be moved by the dock employees who were members of Teamsters. The Board found further that in most instances the dock employees continued to handle American Iron freight until instructed by representatives of their union not to do so.

Here, as above stated, Machinists had no connection with the contract containing the hot cargo clause and Teamsters' contract could not constitute the basis for a defense by Machinists.

We have examined the other contentions of Machinists, among them that the Board erred in not finding that the controversy was moot because the complaint was filed after the strike between Machinists

and American Iron had been settled by execution of a new contract. A reading of the Act would indicate that a complaint may be filed where the party charged "has engaged in or is engaging" in unfair labor practices. There can be no doubt that orders dealing with unfair labor practices have preventive as well as remedial effects.

Machinists also contend that their picketing at the carriers' premises was legitimate primary activity aimed only at American Iron employees. This contention is foreclosed by the fact that the findings of the Board were based upon disputed facts; and there is substantial evidence to sustain the findings of the Board.

Circuit Judge Prettyman concurs in the result in No. 13,406 but for different reasons, which reasons he will state in a separate opinion.

Circuit Judge Washington dissents for reasons which he will state separately.

Order of Board in No. 13394 set aside.

Order of Board in No. 13406 affirmed.

PRETTYMAN, Circuit Judge, dissenting in part and concurring in part: I dissent from Judge Bastian's opinion and proposed judgment in No. 13394, relating to the Teamsters. In a nutshell my view is that the hot cargo clause cannot be enforced by a strike, because such a strike or refusal to work is flatly forbidden by Section 8 (b) (4) (A) of the Act.

A strike is a concerted refusal by employees to do work the employer wants done. This is the purport of the opinions on the point.[5] A refusal to work is likewise a declination directed at the employer. So,

[5] See Restatement, Torts § 797 (1939), and the many cases collected under "Strike" in *Words and Phrases*, especially in the pocket supplement.

if an employer and his employees agree that certain work shall not be done, and it is therefore not done, there is no "strike" or "refusal to work". Section 8 (b) (4) (A) forbids only "a strike or a concerted refusal in the course of their employment".

It follows from the foregoing that, if an employer and his employees agree by contract that the employees need not handle certain goods, and both abide by their agreement, there is no "strike" or "refusal to work." But, if an employer, having entered into such a contract, thereafter refuses to abide by his agreement and directs his employees to handle the goods, and his employees refuse to do so, there is a strike or refusal to work. Such a strike or refusal to work, where an object is to force the employer to cease transporting the products of another producer, is forbidden by the statute.

It may be that the right vouchsafed the employer by Section 8 (b) (4) (A) cannot be nullified by contract. Section 7 rights cannot be contracted away.* And it can be argued that when Congress meant Section 8 rights to be subject to contra[illegible] it said so, as it did in Section 8 (a) (3). But I need not reach that question, and, since the answer, one way or the other, involves such sweeping considerations, I do not undertake it. On the other hand it may be that the hot cargo clause is a valid contract agreement between the carriers and their employees and may validly be carried out by both parties. But even so, when a carrier refuses to comply with the contract, even though he is thereby violating the agreement, the Teamsters, his employees, may not strike or refuse to work in order to prevent the handling of the struck goods.

Nat. Licorice Co. v. Labor Board, 309 U. S. 350, 84 L. Ed. 799, 60 S. Ct. 569 (1940). See also *Bethlehem Steel Company*, 89 N. L. R. B. 341 (1950).

I think the employees may not violate the statute in order to enforce their agreement with the carrier.[7]

The sum of it is that Section 8 situations can legally be avoided, by contract or otherwise. Employers and employees need not so conduct themselves as to give rise to Section 8 prohibitions. But the terms of the statute cannot be nullified, by contract or otherwise. And so employers and employees cannot agree that even if a situation covered by the statute does occur the statute shall not apply.

I do not agree with the argument that the hot cargo clause has the effect of removing struck goods from "the course of their [the Teamsters'] employment." If such a construction could be placed upon the phrase in Section 8 (b) (4) (A), careful contract draftsmanship could legalize without qualification any otherwise prohibited activity, *e. g.*, the jurisdictional strike, the sympathy strike, and the wildcat strike, by artificially exempting the work involved from the course of the employment governed by the contract. I think the statute cannot thus be nullified.[8]

One of the carriers involved here adhered to its agreement and would not request its employees to

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[7] Strong evidence of the public interest in the problem is afforded by the fact that the motor carrier which honors a hot cargo clause thereby violates duties owed the public, breaches other contracts, and may well be in violation of another public law, Part II of the Interstate Commerce Act, 49 Stat. 543 (1935), as amended, 49 U. S. C. A. § 301 *et seq.* See the *Examiner's Decision in Galveston Truck Line Corp.* v. *ADA Motor Lines*, I. C. C. No. MC–C–1922 (April 1957), which involves actions of our appellant Teamsters, Local No. 886, and cooperating motor carriers.

[8] The Board's rejection of this argument on another ground, *Sand Door & Plywood Co.*, 113 N. L. R. B. 1210, 1217 (1955), was cited with approval by the Sixth Circuit in *National Labor Relations Board* v. *Local 11, United Brotherhood of Carpenters, Etc., et al.*, — F. 2d — (1957).

handle the goods. Its employees did not strike. So in that particular case I would not affirm the cease and desist order. As to all the other carriers I would affirm as to the Teamsters.[9].

I concur in Judge Bastian's proposed judgment in No. 13406, relating to the Machinists. I also agree with his opinion in that regard, except that I add, since as I have pointed out I think the hot cargo clause could not be enforced by a strike, that it could not have been so enforced by the Machinists even if they had been parties to the contract.

WASHINGTON, *Circuit Judge*, concurring in Judge Bastian's opinion in No. 13394, and dissenting from the latter's opinion in No. 13406:

In the *General Drivers* case, I think Judge Bastian is correct in his treatment of the "hot cargo" clause and its effect. That clause is bargained for, and must be presumed to be balanced by concessions which the employer has obtained at the bargaining table. To say that the employer is free in his discretion to recognize or ignore the clause, when a concrete problem comes up, seems to me to encourage lawlessness in industrial relations. Once a valid contract has been made—and contracts such as this have been recognized as valid by the Board and the Second Circuit—both sides are entitled to rely on the prompt and faithful execution of its provisions. I therefore agree that efforts by the Teamsters to induce their own members to abide by the terms of the "hot cargo" clause embodied in their

[9] In *National Labor Relations Board* v. *Local 1976, United Brotherhood of Carpenters, Etc., et al.*, 241 F. 2d 147 (1957), the Ninth Circuit reached the result suggested in this dissent. See also *National Labor Relations Board* v. *Local 11, United Brotherhood of Carpenters, Etc., et al.*, —— F. 2d —— (6th Cir. 1957).

collective bargaining agreement are not violative of Section 8 (b) (4) (A).

The same reasoning impels me to the conclusion (in No. 13406) that the efforts of the Machinists, directed toward the same end, are similarly outside the scope of the statutory proscription. It is true that the Machinists are not a party to the contract which contains the "hot cargo" clause, and not a third-party beneficiary of it. But this does not mean that the existence of the clause has no effect on the lawfulness of the Machinists' conduct. The clause is evidence of the advance consent of the trucking companies that their employees are to refrain from handling struck goods. Because the employers have given this consent and because no basis appears in the statute for permitting this consent to be revoked on an ad hoc basis, the efforts of the contracting union (the Teamsters) to induce employees of the trucking companies to comply with the clause are upheld. The reasoning must be that what is being induced is not a "strike or refusal to work" with an object of "forcing" or "requiring" an employer to cease doing business with another person within the meaning of Section 8 (b) (4) (A). This being so, I cannot agree that what is being induced *is* within the meaning of the statute when the inducing is done by the primary employees, the Machinists. The operative effect of the employer's consent is, in my view, the same, regardless of who it is that reminds the secondary employees of the terms of their contract, and seeks to induce compliance with it.

2. *Judgment Below*

United States Court of Appeals for the District of Columbia Circuit

APRIL TERM, 1957

No. 13394

GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 886, AFL–CIO, PETITIONER

v.

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LOCAL 850, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL–CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITIONS TO REVIEW AND SET ASIDE, AND ON REQUEST FOR ENFORCEMENT OF, AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: PRETTYMAN, WASHINGTON AND BASTIAN, *Circuit Judges*

Judgment

These cases came on to be heard on the record from the National Labor Relations Board, and were argued by counsel.

On consideration whereof, It is ordered and decreed by this Court that the order of the National Labor Relations Board on review in these cases be, and it is hereby, set aside so far as it applies to General Drivers, Chauffeurs, Warehousemen, and Helpers Union, Local No. 886, and that it be, and it is hereby,

affirmed so far as it applies to Local 850, International Association of Machinists.

Pursuant to Rule 38 (1) the respondent shall within 10 days hereof serve and file a proposed enforcement decree in case No. 13406.

Dated: May 9, 1957.

Per Circuit Judge BASTIAN.

Separate opinion by Circuit Judge Prettyman dissenting with respect to case No. 13394 and concurring as to case No. 13406.

Separate opinion by Circuit Judge Washington concurring as to case No. 13394 and dissenting as to case No. 13406.

3. *Decree Below.*

United States Court of Appeals for the District of Columbia Circuit

No. 13394

GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 886, AFL–CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

No. 13406

LOCAL 850, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL–CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

DECREE ENFORCING IN PART AND DENYING IN PART AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: PRETTYMAN, WASHINGTON AND BASTIAN, *Circuit Judges*

This cause came on to be heard upon the petitions of General Drivers, Chauffeurs, Warehousemen and

Helpers Union, Local No. 886, AFL–CIO (hereinafter called Teamsters) and Local 850, International Association of Machinists, AFL–CIO (hereinafter called Machinists) to review and set aside an order of the National Labor Relations Board dated March 15, 1956. The Court heard argument of respective counsel on January 11, 1957, and has considered the briefs and the transcript of record filed in this cause. On May 9, 1957, the Court being fully advised in the premises handed down its decision granting enforcement of the Board's order as to the Machinists, but denying enforcement against the Teamsters. In conformity therewith, it is hereby

Ordered, adjudged and decreed by the Court that Local 850, International Association of Machinists, AFL–CIO, and its officers, representatives, agents, successors and assigns, shall:

1. Cease and desist from inducing or encouraging the employees of Gillette Motor Transport, Inc., D. C. Hall Transport, Inc., Santa Fe Trails Transportation Company, Time, Inc., and Lee Way Motor Freight Lines, or any other employer, to engage in a strike or concerted refusal in the course of their employment to work on or handle freight consigned to or received from American Iron and Machine Works Company, or any other employer, where an object thereof is to force or to require any employer or person to cease doing business with American Iron and Machine Works Company.

2. Take the following affirmative action, which the Board has found will effectuate the policies of the National Labor Relations Act, as amended (hereinafter called the Act):

(a) Post at its business offices in Oklahoma City, Oklahoma, copies of the notice attached hereto as Appendix A. Copies of said notice, to be furnished by the Regional Director for the Sixteenth Region of the

National Labor Relations Board, Fort Worth, Texas, after being duly signed by an official representative of the Machinists, shall be posted by the Machinists immediately upon receipt thereof, and maintained by it for a period of sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to members of the Machinists are customarily posted. Reasonable steps shall be taken by the Machinists to insure that said notices are not altered, defaced, or covered by any other material. The Machinists shall also sign copies of the notice, which the Regional Director shall submit for posting at the Oklahoma City premises of Gillette Motor Transport, Inc., D. G. Hall Transport, Inc., Santa Fe Trails Transportation Company, and Time, Inc., said employers being willing. The Machinists shall also sign a copy of the notice for posting at Lee Way Motor Freight Lines;

(b) Notify the aforesaid Regional Director in writing within ten (10) days from the date of this Decree what steps the Machinists have taken to comply herewith.

It is further hereby ordered, adjudged and decreed that those portions of the Board's order applicable to General Drivers, Chauffeurs, Warehousemen and Helpers Union, Local No. 886, AFL–CIO be and it hereby is set aside.

Dated: June 7, 1957.

(S) E. BARRETT PRETTYMAN,
Judge, United States Court of Appeals for the District of Columbia Circuit.

(S) GEORGE T. WASHINGTON,
Judge, United States Court of Appeals for the District of Columbia Circuit.

(S) WALTER M. BASTIAN,
Judge, United States Court of Appeals for the District of Columbia Circuit.

APPENDIX A

NOTICE TO ALL EMPLOYEES

Pursuant to a Decree of the United States Court of Appeals for the District of Columbia Circuit, enforcing an order of the National Labor Relations Board, and in order to effectuate the policies of the Labor Management Relations Act, we hereby give notice that:

> We will not induce and encourage the employees of any employer other than American Iron and Machine Works Company to engage in a strike or concerted refusal in the course of their employment to perform services for their employer, where an object thereof is to force or require any employer or person to cease doing business with American Iron and Machine Works Company.

LOCAL 850, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL–CIO.
(Labor Organization)

By _____
(Representative) (Title)

Dated _____

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

U. S. GOVERNMENT PRINTING OFFICE: 1957

Nos. 273 and 324

In the Supreme Court of the United States

OCTOBER TERM, 1957

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 886, AFL-CIO

LOCAL 850, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D. C.

JEROME D. FENTON,
General Counsel,
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Associate General Counsel,
DOMINICK L. MANOLI,
Assistant General Counsel,
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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 273

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 886, AFL–CIO

No. 324

LOCAL 850, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL–CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below (R. 195–204) is reported at 247 F. 2d 71. The findings of fact, conclusions of law, and order of the Board (R. 63–67, 26–61) are reported at 115 NLRB 800.

JURISDICTION

The judgment of the court below (R. 205-206) was entered on May 9, 1957, and its decree (R. 206–208) issued on June 7, 1957. The writs of certiorari were granted on October 14, 1957 (R. 209). The jurisdiction of this Court rests upon 28 U. S. C. 1254 and Section 10 (e) of the National Labor Relations Act, as amended, 61 Stat. 147, 29 U. S. C. 160 (e).

STATUTE INVOLVED

The principal provision involved is Section 8 (b) (4) (A) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), which reads as follows:[1]

> SEC. 8 (b). It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * * *
>
> (4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * *

[1] Other relevant provisions of the Act are set forth in Appendix A, pp. 64–69, *infra*.

QUESTIONS PRESENTED

The question presented in No. 273 is whether union inducement of employees not to handle or work on goods, which would otherwise be proscribed as a secondary boycott by Section 8 (b) (4) (A) of the National Labor Relations Act, as amended, is lawful because the employer and the union have agreed by contract that the employees shall not be required to handle "unfair goods."

The questions presented in No. 324 are:

1. Whether, if the question in No. 273 is answered in the affirmative, the agreement therein described would also legalize inducement of the employees by another union, which is not a party to the contract;

2. Whether substantial evidence supports the Board's conclusion that this union's action was not primary activity outside the purview of Section 8 (b) (4) (A);

3. Whether the Board proceeding was rendered moot by settlement of the underlying dispute.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

On September 15, 1954, Local 850 of the International Association of Machinists (hereafter called the Machinists), the bargaining representative of the production and maintenance employees of the American Iron and Machine Works, called a strike in support of its contract demands at the Company's three plants in Oklahoma City, Oklahoma.[2] The Ma-

[2] American Iron and Machine Works is engaged in the manufacture and sale of oil field equipment (R. 29).

chinists set up picket lines at each of the plants, and continued to picket there throughout the strike (R. 31; 128–130). The picketing deterred the five motor carriers normally servicing American Iron[3] from making pick-ups and deliveries at its premises, whereupon the Company hauled its freight in its own trucks to the Oklahoma City loading platforms of the carriers for shipment (R. 32; 118).

The Machinists followed the American Iron trucks to the premises of the carriers and picketed them while they remained there (R. 32; 124–125). The signs worn by the pickets did not name American Iron, stating simply that the Machinists were on strike (R. 32; 113). The Machinists admittedly intended that this picketing would induce the carriers' employees not to "get on the American Iron equipment and handle the freight" (R. 124–125, 119).

In addition to engaging in such picketing at the carriers' docks, the Machinists expressly requested employees of the motor carriers not to handle American Iron freight. Thus, at the dock of carrier Time, Machinists' Business Representative Foster, in the hope that Time employees "wouldn't get in the truck and be handling the stuff," informed a Time steward that Machinists had "a picket on a hot load of material out here" (R. 39; 123–124). Robert Pickett, a Machinists picket captain, stated to Troxel, a dock

[3] Santa Fe Trail Transportation Co.; Gillette Motor Transport; Time, Inc.; D. C. Hall Transportation Co.; and Lee Way Motor Freight Lines. These are common carriers for hire engaged in the interstate business of hauling freight by motor vehicle, under certificates from the Interstate Commerce Commission (R. 3, 9).

steward for carrier Santa Fe, "Well, I hope you boys observe our picket and help us out" (R. 37; 159-160). When an American Iron truck arrived at the dock of carrier Hall, Business Representative Foster told a Hall employee, who was prepared to assist in unloading freight on the truck, that "he couldn't help," and the employee immediately stopped (R. 39–40; 161). Similarly, on the arrival of such a truck at the Lee Way dock, Machinists' agent Pickett told William Hall, a Lee Way dock steward, that he "shouldn't" handle the freight on the truck (R. 40; 137).

General Drivers, Local No. 886 (hereafter called the Teamsters), was the collective bargaining representative of the employees of the motor carriers. Its contract with each of the carriers contained the following "hot cargo" clause (R. 41–42; 140, 187):

> ARTICLE 4
>
> * * * * *
>
> "(b) Members of the Union shall not be allowed to handle or haul freight to or from an unfair company, provided this is not a violation of the Labor Management Relations Act of 1947.

Invoking this clause, agents of the Teamsters directed the carrier employees to cease handling American Iron freight. In each instance, except that involving the Lee-Way Motor Freight Lines, the carrier, notwithstanding the hot cargo clause, ordered its employees to handle the freight. In every case, the carrier employees complied with the Teamsters' instructions (R. 49–57).

Thus, on September 16, 17 and 26, 1954, Teamsters stewards employed by carrier Santa Fe, predicating their action on the "hot cargo" clause in the Teamsters' contract with Santa Fe, ordered Santa Fe dock employees to refuse to handle American Iron freight (R. 49–50; 5–6, 9, 151). Santa Fe, entertaining doubts that the clause covered the American Iron situation, and hearing that the other carriers were handling American Iron freight, had previously instructed its employees to handle such freight (R. 50–51; 171). After the union's orders issued, Santa Fe's employees ceased to perform this work (R. 49–50; 5, 9, 169–170).

Similarly, carrier Gillette, believing that the handling of American Iron freight after it had been placed on the loading platform was not prohibited by the contract and that "according to the Interstate Commerce Commission we had to handle the freight" (R. 145), had directed its employees to handle such freight (R. 51; 144). About October 6, 1954, Teamsters agent Mitchell appeared on the Gillette dock and Gillette freight agent Berrong, in the presence of steward Hawkins, asked whether Mitchell considered the American Iron freight unfair once it was placed on the Gillette loading dock. Mitchell refused to make a definite statement but referred Berrong and Hawkins to Article 4 of the contract. Thereafter, all of Gillette's dock employees refused to handle American Iron freight (R. 51–52; 6, 9, 141–145).

Carrier Time first attempted to adjust to the American Iron labor dispute by handling American Iron shipments through dock foreman Armstrong and an

assistant foreman. However, believing that this might violate the provisions of the union contract prohibiting the performance of manual labor by supervisors, Time officials then assigned a dock employee, Brown, to this work. Brown refused, stating that Teamsters steward McGilliard had told him he would be fined $65 if he handled the "unfair" freight. The next day, foreman Armstrong spoke with McGilliard about the matter, and the latter replied that Teamsters agent Mitchell had ordered the employees not to handle American Iron freight. Thereupon, Armstrong and his assistant resumed handling such freight themselves, without the help of the rank-and-file employees (R. 53–54; 6, 9, 138–139).

At carrier Hall, terminal manager Lowe, about September 16, 1954, instructed an employee to handle some American Iron freight because "that's what we are in business for" and because other carriers were handling that freight (R. 55, 154, 156–158). When Teamsters steward Wilkerson learned of this, he contacted Teamsters agent Mitchell, who stated that such handling violated Article 4 (b) of the contract and that any union member doing so might lose his union book and thus be subject to discharge. Wilkerson relayed this information to the dock employees, and then advised Lowe that the men could not handle American Iron shipments. Lowe, in turn, advised American Iron representatives that Hall could not forward its freight, although it desired to do so (R. 55–56; 6, 7, 9, 151–158).

B. THE BOARD'S CONCLUSIONS AND ORDER

The Board, with two members dissenting, concluded that the Teamsters' appeals to the carriers' employees not to handle American Iron freight were violative of Section 8 (b) (4) (A) of the Act, notwithstanding the "hot cargo" clause in the Teamsters' contracts with the carriers. Two members of the Board majority (Chairman Leedom and Member Bean), adopting the view expressed in the earlier *Sand Door* case, 113 NLRB 1210,[4] held that, irrespective of the validity of the "hot cargo" clause itself, the Act precluded enforcement of the clause by union appeals to employees. They stated (R. 64):

> * * * any direct appeal by a union to engage in a strike or concerted refusal to handle a product is proscribed by the Act when one of the objectives set forth in Section 8 (b) (4) (A) is present. Thus, while Section 8 (b) (4) (A) does not forbid the execution of a hot cargo clause or a union's enforcement thereof by appeals to the employer to honor his contract, the Act does, in our opinion, preclude enforcement of such clause by appeals to employees, and this is so whether or not the employer acquiesces in the union's demand that the employees refuse to handle "hot" goods * * *

The third member of the Board majority (Member Rodgers) held that the "hot cargo" clause could not

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[4] Enforced, *sub nom. National Labor Relations Board* v. *Local 1976, United Brotherhood of Carpenters*, 241 F. 2d 147 (C. A. 9), and now before this Court in No. 127, certiorari granted, October 14, 1957.

serve as a defense to conduct within the purview of Section 8 (b) (4) (A) because the clause itself was contrary to the policy of the Act (R. 67).[5]

The Board, again with two members dissenting, further concluded that the Machinists' picketing and allied activities at the carriers' docks were likewise violative of Section 8 (b) (4) (A). The Board rejected the Machinists' contentions that their activity at the docks was merely an incident of legitimate

[5] Subsequent to its decision herein, the Board members have further explicated their reasons for holding that a "hot cargo" clause does not privilege union inducement of employees otherwise within the terms of Section 8 (b) (4) (A). *Truck Drivers Local Union No. 728 (Genuine Parts Company)*, 119 NLRB No. 53, reprinted in Appendix B, pp. 70–135, *infra*. In that case, four members of the Board (the three who comprised the majority here and Member Jenkins, who replaced one of the dissenters) subscribed to the ultimate conclusion in the instant case, *viz.*, that Section 8 (b) (4) (A) bars such inducement irrespective of the existence of a "hot cargo" clause (see also n. 25, p. 32, *infra*). In so doing, two members relied on the same reasons which they advanced here—*i. e.*, Member Bean was of the view that, although Section 8 (b) (4) (A) did not necessarily invalidate the "hot cargo" clause itself, the union's attempt to enforce the clause through employees came within the statutory prohibitions; and Member Rodgers adhered to the view that the "hot cargo" clause itself was invalid because contrary to the policy of the Act. However, Chairman Leedom, whose position in the instant case was the same as that of Member Bean, decided that, in a situation where the employer-party to a "hot cargo" clause was a common carrier subject to the Interstate Commerce Act (such as in *Genuine Parts* and this case), there was an additional reason why the clause could not be regarded as privileging Section 8 (b) (4) (A) conduct—*i. e.*, the clause was contrary to the obligations imposed on carriers by the Interstate Commerce Act, and hence invalid for this reason. Member Jenkins joined with Chairman Leedom in this view.

primary activity directed against American Iron, and that the activity was, in any event, lawful by virtue of the "hot cargo" clause in the Teamsters' contracts with the carriers (R. 65).

The Board entered an order requiring the Teamsters and the Machinists to cease and desist from the unfair labor practices found, and to post appropriate notices (R. 65–67).

C. THE DECISION OF THE COURT BELOW

The court below (with one judge dissenting on each part of the case) set aside the Board order against the Teamsters and enforced the Board order against the Machinists (R. 195–204). The court held that Section 8 (b) (4) (A) does not affect the validity of "hot cargo" agreements as such. From this, it reasoned that "it is hard to see how it can be said that, simply because the employees do what they have the right to do, there was a strike or refusal to work" (R. 198–199). Accordingly, the court concluded that the Teamsters' enforcement of their "hot cargo" agreements with the carriers by appeals to the carriers' employees was not in violation of Section 8 (b) (4) (A). However, the court concluded that the Machinists', picketing and related activity at the carriers' docks were violative of Section 8 (b) (4) (A). It ruled that, since the Machinists union was neither a party to, nor a third party beneficiary of, the Teamsters' contracts, these contracts could not make lawful the Machinists' secondary activities (R. 200).

SUMMARY OF ARGUMENT

I

Section 8 (b) (4) of the Act makes it an unfair labor practice for a labor organization or its agents to induce or encourage employees to engage in "a strike or a concerted refusal in the course of their employment" to work on any goods for an object (A) of "forcing or requiring * * * any employer or other person" to cease handling the products of, or to cease doing business with, any other person, or (B) of "forcing or requiring any other employer" to recognize a labor organization not certified by the Board as the representative of its employees. The basic question is whether union inducement of employees not to handle disfavored goods is exempt from the proscription of this section where the employer, by a "hot cargo" clause in his contract with the union, has, in effect, consented in advance to the employees' refusal. Interpreting the language of Section 8 (b) (4) (A) and (B) in the light of the purposes sought to be attained by Congress, the Board reasonably concluded that the section bans union inducement of employee refusals to work on disfavored goods irrespective of employer acquiescence.

A. As this Court recognized in *National Labor Relations Board* v. *Denver Building and Construction Trades Council*, 341 U. S. 675, 686, Section 8 (b) (4) (A) and (B) was aimed at "secondary boycotts," and makes no distinction between "good secondary boycotts and bad secondary boycotts." The refusal of employees to handle the goods of another employer, merely because they were produced under conditions

disfavored by the union, was a practice which witnesses before the Senate Labor Committee repeatedly urged should be outlawed as a secondary boycott. Moreover, the legislative history shows that Congress specifically intended that Section 8 (b) (4) (A) and (B) would cover and prohibit such product boycotts when effected through work stoppages of employees. See 93 Cong. Rec. 4198–4199, 2 Leg. Hist. of the Labor Management Relations Act, 1947 (G. P. O., 1948), 1107–1108 (Senator Taft).

B. At the time of the enactment of Section 8 (b) (4) (A) and (B), the practice of securing in advance employer consent to the employees' refusal to handle disfavored goods, by means of a "hot cargo" clause in the collective bargaining contract, was a well known method of effecting these boycotts. Furthermore, the factor of employer acquiescence had been particularly common in the programs of the United Brotherhood of Carpenters and the International Brotherhood of Teamsters, the parent bodies of the unions involved in this case and the companion cases, Nos. 127 and 412. And Congress was aware of how these unions operated long before the passage of the Taft-Hartley amendments in 1947.

C. In view of Congress' desire and purpose to proscribe secondary boycotts effected by work stoppages of employees, without distinguishing between "good secondary boycotts and bad secondary boycotts," and its awareness that such boycotts were frequently carried out with the acquiescence of the employer, it seems unlikely that Congress would have intended to make an exception for the latter situation. An ex-

ception for employee work stoppages acquiesced in by the employer would be incompatible with the broad protection which Section 8 (b) (4) (A) and (B) was intended to provide.

In banning secondary boycotts, Congress desired to protect not only the particular secondary employer whose employees would be the immediate target of the union's inducement, but also the other employers and persons, including members of the general public, who would be affected by the boycott. This is demonstrated not only by the legislative history; it also finds expression in the statutory provisions. Thus, the fact that Section 8 (b) (4) (A) and (B) was enacted for the protection of the public is shown, *inter alia,* by Section 10 (l), which empowers and directs the Board, "acting in the public interest and not in vindication of purely private rights" (S. Rep. No. 105, 80th Cong., 1st Sess., p. 8, 1 Leg. Hist. 414), to apply for immediate injunctive relief against conduct which appears to be violative of the Section 8 (b) (4). Further, the illegal object specified in subsection (A) of Section 8 (b) (4) is "forcing or requiring * * * *any employer or other person*" to cease doing business with another. This language comprehends not only the employer whose employees may be induced by the union, but also other employers and persons who use, sell, transport, or handle the boycotted goods. And subsection (B) defines the illegal object as "forcing or requiring *any other* employer to recognize or bargain with a labor organization" unless such organization has been certified by the Board. The phrase "any other employer" obviously refers to the employer

with whom the union has its primary dispute, the purpose of the subsection being to preclude secondary pressure on him to grant recognition.

The purpose of Section 8 (b) (4) (A) and (B) thus being broader than merely to protect the secondary employer whose employees have been induced by the union, "obviously contractual waiver by [that] party * * * could be of no moment." *Alpert* v. *United Brotherhood of Carpenters,* 143 F. Supp. 371, 374–375 (D. Mass.). Otherwise, the public and the other employers and persons injured by the boycott would lose their statutory protection without their consent.

D. The language of Section 8 (b) (4) (A) and (B) permits a construction entirely consistent with the statute's history and purpose. The section proscribes a union from inducing or encouraging employees to engage in "a strike or a concerted refusal in the course of their employment" to handle products. While the terms "strike" and "concerted refusal" usually presuppose action which is contrary to the employer's will, this is not invariably so, at least in the case of "concerted refusal." Literally, the union induces a "concerted refusal" by employees to perform work whenever it requests them, while on the job, not to perform a task. Giving the term "concerted refusal" this interpretation is justified because it avoids the deleterious consequences of reading the term as comprehending only those refusals which are opposed by the employer, *i. e.,* foreclosing the other interests sought to be protected by Section 8 (b) (4) (A) and (B) without the consent of those affected.

In addition, there is persuasive evidence that Congress viewed the term "concerted refusal" as covering employee refusals acquiesced in by the employer, adding the term "strikes" to insure that the ban on secondary boycotts would also cover employee refusals which the employer opposed (92 Cong. Rec. 5724).

To interpret "concerted refusal" as covering all union-induced employee refusals, whether or not the employer has consented thereto, does not clash with the requirement of Section 8 (b) (4) that the employees' concerted refusal be "in the course of their employment." The phrase "course of their employment" as here used, serves to distinguish between employee refusals to handle products *qua* employees and their refusals to patronize disfavored employers or products in other capacities, *e. g.*, as consumers.

The court below reasoned that, if the Act does not prohibit an employer and a union from agreeing to a "hot cargo" clause, it would be anomalous if the union were unable to enforce the "hot cargo" clause through appeals to employees. However, this overlooks the fact that the secondary boycott provisions of the Act were not enacted solely for the benefit of the secondary employer who has contracted with the union. If, as we believe to be the case, Congress intended to protect other interests as well, the private contractual arrangement of the union and one of the persons affected cannot be decisive; it must give way to the extent necessary to permit the purposes of the section to be fully effectuated.

Nor is it relevant that Section 8 (b) (4) (A) and (B), although barring the union from appealing to

employees, might nevertheless permit enforcement of a "hot goods" clause through appeals or threats addressed solely to the *employer*. "An employer may well remain free to decide, as a matter of business policy, whether he will accede to a union's boycott demands, or if he has already agreed to do so, whether he will fulfill his agreement. An entirely different situation, however, is presented * * * when it is sought to influence the employer's decision by a work stoppage of his employees." *National Labor Relations Board* v. *Local 1976, United Brotherhood of Carpenters*, 241 F. 2d 147, 153 (C. A. 9), now before this Court in No. 127.

E. In any event, the consent manifested in the "hot cargo" agreement involved in this case is not entitled to legal recognition. It is the present view of a majority of the Board that a "hot cargo" clause is invalid, at least where, as here, the employer-party thereto is a common carrier subject to the Interstate Commerce Act. *Genuine Parts Company*, Appendix B, *infra*, pp. 70–135. If a common carrier cannot, consistently with the obligations of federal law, give or refuse service to customers on the basis of union preferences, an agreement to honor those preferences is vitiated.

II

A. Even if, contrary to our argument in Point I, the "hot cargo" agreement were deemed to privilege inducement of employees by the union which is a party to the contract, it does not follow that inducement of such employees by another union would also be exempt from Section 8 (b) (4) (A). Although

the employer may have consented to let the bargaining representative of his employees interrupt their handling of certain goods, there is no reason for assuming that the consent manifested in the "hot cargo" clause goes so far as to authorize such action on the part of a stranger union. Accordingly, inducement of employees by such a union can find no justification in consensual arrangement and it is plainly within the ban of Section 8 (b) (4) (A).

B. Substantial evidence supports the Board's conclusion that the Machinists' picketing and allied activity at the docks of the motor carriers were directed at the carriers and their employees, and were not merely an incident of legitimate primary picketing directed against American Iron.

C. The settlement of the underlying dispute did not render the Board proceeding moot. Discontinuance of an unfair labor practice does not preclude the Board from barring its resumption in the future.

ARGUMENT

INTRODUCTION

Section 8 (b) (4) of the Act makes it an unfair labor practice for a labor organization or its agents—

> to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to * * * transport, or otherwise handle * * * any goods * * *,

where an object thereof is:

> (A) forcing or requiring * * * any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the prod-

> ucts of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * *.

In the instant case, it is clear that both the Teamsters and the Machinists induced or encouraged the employees of the motor carriers not to handle the freight of American Iron, which was engaged in a labor dispute with the Machinists, and that an object of this action was to stop the flow of products to and from American Iron. The principal question presented is whether the Teamsters' inducement nevertheless was exempt from the proscription of Section 8 (b) (4) (A) because the motor carriers had, by the "hot cargo" clause in their contracts with the Teamsters, in effect consented in advance to their employees not handling disfavored goods, such as the American Iron freight. Stated in statutory terms, the question is, first, whether employees may be induced to "strike" or concertedly to refuse to perform work "in the course of their employment" within the meaning of the first part of Section 8 (b) (4) (A), where their employer has previously consented to the action sought to be attained by the union, and, second, whether, in view of such acquiescence, there is a "forcing or requiring" of any employer to cease doing business with any other person, as proscribed in the "object" part of the section.

The court below concluded that there is no violation of Section 8 (b) (4) (A) where a union, which is a party to a "hot cargo" agreement with the employer, merely induces employees to abide by that agreement. This is also the view of the Second Cir-

cuit in *Milk Drivers and Dairy Employees Local Union No. 338* v. *National Labor Relations Board*, 245 F. 2d 817, which is now pending before the Court on petition for writ of certiorari in No. 412.[6] And the Board itself originally adopted this position.[7] However, after further study and consideration, the Board has concluded that the contrary view—*i. e.*, that a "hot cargo" clause does not remove union inducement of employee refusals to handle disfavored goods from the reach of Section 8 (b) (4) (A), or the companion Section 8 (b) (4) (B)[8]—is consistent with the language of these provisions and more fully effectuates their purposes. The Board's current view has been accepted by the Ninth Circuit in *National Labor Relations Board* v. *Local 1976, United Brotherhood of Carpenters*, 241 F. 2d 147, which is before this

[6] At least one judge on another panel of the Second Circuit has subsequently indicated his disagreement with the holding in that case; the other two judges reserved decision on the matter; *Douds* v. *Milk Drivers and Dairy Employees Union Local 584*, No. 24762, decided October 2, 1957, 40 LRRM 2669, 2672.

[7] *International Brotherhood of Teamsters, Local 294 (Raboin d/b a Conway's Express)*, 87 NLRB 972, 981-983, affirmed, *sub nom. Raboin d/b a Conway's Express* v. *National Labor Relations Board*, 195 F. 2d 906, 912 (C. A. 2); *Chauffeurs, Local Union No. 135 (Pittsburgh Plate Glass Co.)*, 105 NLRB 740.

[8] No. 412 involves Section 8 (b) (4) (B) as well as Section 8 (b) (4) (A). The only difference between the two provisions is in the object proscribed. Section 8 (b) (4) (B) defines the illegal object as "forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9."

Court in No. 127, certiorari granted, October 14, 1957.[9]

In Point I below, we urge that, interpreting the language of Section 8 (b) (4) in the light of the purposes sought to be attained by Congress, the Board reasonably concluded that it bans union inducement of employee refusals to work on disfavored goods, irrespective of whether the employer has acquiesced in the refusal. If this be so, the "hot cargo" clause in the Teamsters' contracts with the motor carriers could not authorize either that union or the Machinists to induce the carriers' employees not to handle American Iron freight.

The subsidiary questions presented by No. 324 are treated in Point II. There we argue: (1) that even if, contrary to Point I, the "hot cargo" clause afforded protection to the Teamsters, it did not sanction the Machinists' inducement of the carrier employees; (2) that the Machinists' inducement of such employees was not primary activity outside the purview of Section 8 (b) (4) (A); and (3) that the Board proceeding

[9] In addition to the decision in the instant case (115 NLRB 800, R. 63–72), see *International Brotherhood of Teamsters, Local No. 554 (McAllister Transfer, Inc.)*, 110 NLRB 1769; *Local 1976, United Brotherhood of Carpenters (Sand Door and Plywood Co.)*, 113 NLRB 1210; *Truck Drivers Local Union No. 728 (Genuine Parts Company)*, Appendix B, *infra*. See also, *National Labor Relations Board v. Local 11, United Brotherhood of Carpenters*, 242 F. 2d 932 (C. A. 6); *Douds v. Milk Drivers and Dairy Employees Union Local 584* (C. A. 2), cited n. 6, *supra*; *Alpert v. United Brotherhood of Carpenters*, 143 F. Supp. 371 (D. Mass.); *Douds v. Milk Drivers and Dairy Employees Local No. 680*, 133 F. Supp. 336 (D. N. J.).

was not rendered moot by a settlement of the underlying dispute.

I

THE BOARD REASONABLY CONCLUDED THAT SECTION 8 (b) (4) (A) AND (B) OF THE ACT REACHES UNION-INDUCED EMPLOYEE REFUSALS TO WORK ON DISFAVORED GOODS IRRESPECTIVE OF WHETHER THE EMPLOYER HAS AGREED BY CONTRACT THAT THE EMPLOYEES NEED NOT WORK ON "HOT GOODS"

In construing Section 8 (b) (4) (A) and (B) of the Act, as the earlier cases before this Court involving that section illustrate,[10] one must "interpret its word in the light of its legislative history and of the particular evils at which the legislation was aimed." *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 489. Thus, read without reference to purpose, the words of this section would reach even strikes and picketing directed solely at the employer with whom the union has its primary dispute. *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U. S. 665; *DiGiorgio Fruit Corp.* v. *National Labor Relations Board*, 191 F. 2d 642, 648-649 (C. A. D. C.), certiorari denied, 342 U. S. 869. Accordingly, before attempting to give content to the terms "strike" and "concerted refusal in the course of their employment," or the other terms used in Section 8

[10] *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U. S. 665; *National Labor Relations Board* v. *Denver Building and Construction Trades Council*, 341 U. S. 675; *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 341 U. S. 694; *Local 74, United Brotherhood of Carpenters and Joiners of America*, 341 U. S. 707.

(b) (4) (A) and (B), we turn to the legislative history to ascertain the "mischief to be corrected and the end to be attained." *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 124. We shall urge: (1) that Congress intended to proscribe product boycotts of the type involved here, effected by work stoppages of employees; (2) that it was aware that employee refusals to handle disfavored products were often acquiesced in by the employer, either through "hot cargo" agreements or other arrangements with a union; and (3) that there is every reason to conclude that Congress intended no exception for this situation. Against this background, we argue that the language of Section 8 (b) (4) (A) and (B) may properly be construed as banning union inducement of employee refusals to work on disfavored goods irrespective of whether the employer has acquiesced in the refusal.

A. CONGRESS INTENDED TO PROSCRIBE PRODUCT BOYCOTTS OF THE TYPE INVOLVED HERE, EFFECTED BY WORK STOPPAGES OF EMPLOYEES

This Court pointed out in *National Labor Relations Board* v. *Denver Building and Construction Trades Council*, 341 U. S. 675, 686, that, although "§ 8 (b) (4) does not expressly mention 'primary' or 'secondary' disputes, strikes or boycotts, that section often is referred to in the Act's legislative history as one of the Act's secondary boycott sections'."[11]

[11] The other section, the Court added, "is § 303 [of the Labor Management Relations Act, 1947], which uses the same language in defining the basis for private actions for damages caused by these proscribed activities" (*ibid.*).

Thus, in a passage quoted by the Court (*ibid.*), Senator Taft, who was the sponsor of the bill in the Senate, said, in discussing this section (93 Cong. Rec. 4198, 2 Leg. Hist. 1106):

> * * * under the provisions of the Norris-LaGuardia Act it became impossible to stop a secondary boycott or any other kind of a strike, no matter how unlawful it may have been at common law. All this provision of the bill does is to reverse the effect of the law as to secondary boycotts. It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have so broadened the provision dealing with secondary boycotts as to make them an unfair labor practice.

The refusal of employees to handle the goods of another employer, merely because they were produced under conditions disfavored by the union, was a practice which witnesses before the Senate Labor Committee repeatedly urged should be outlawed as a secondary boycott. For example, Roland Rice, General Counsel of the American Trucking Association, describing a situation similar to that presented in this case, complained that (Hearings before the Senate Committee on Labor and Public Welfare, on S. 55 and S. J. Res. 22, 80th Cong., 1st Sess., p. 383):

> * * * organized labor has used the trucking industry as an effective tool in forcing the

unionization of workers in manufacturing and processing plants. If such plants are to operate they must have the raw materials or partly finished products brought to them and the completed products taken away. Much of this transportation is performed today by motortruck. It is a very easy thing to force unionization of workers in these plants by the simple expedient of placing them on an unfair list, and thus denying them the use of motortruck transportation. * * *.

* * * * *

The gravity of this situation cannot be understood unless we remember the effect upon the trucking company which is not at all involved in the controversy, and also upon the numerous consignors and consignees whose freight is tied up because of a conflict with which they have absolutely nothing to do. * * *.

Similarly, Fentress Hill of the Northern Redwood Lumber Company described how the United Brotherhood of Carpenters, in an effort to obtain a closed shop in the lumber yards and thereby unseat the CIO, had classified all lumber produced in a CIO mill as "hot cargo" and directed its members throughout the country not to use or install "any material produced or manufactured from wood not made by members of the United Brotherhood" (Hearings, *supra*, pp. 1718, 1732–1733). And R. S. Edwards of the National Electrical Manufacturers Association testified that Local 3 of the IBEW had obtained a monopoly position in the electrical products field in New York City by the device of directing its members who installed such products not to handle products

manufactured by firms employing electricians who were not members of Local 3 (Hearings, *supra*, p. 177).

Congress had these incidents specifically in mind in enacting the secondary boycott provisions of the Act and intended that these provisions would cover and prohibit such product boycotts, when effected through work stoppages of employees. This is shown by the colloquy between Senator Pepper and Senator Taft, wherein the former opposed Section 8 (b) (4) (A) on the ground that it would bar unions from protecting the standards which they had built up by calling "upon other workers to cooperate, to refuse to work to increase the value of the product of the employer who deals unfairly with them" (93 Cong. Rec. 4198, 2 Leg. Hist. 1106). Senator Taft agreed that the law was to be changed in this respect, because "if that sort of thing is encouraged there will be hundreds and thousands of strikes in the United States * * * there can be a chain reaction that will tie up the entire United States in a series of sympathetic strikes" (93 Cong. Rec. 4198, 2 Leg. Hist. 1107). Illustrating this point, Senator Taft added that Senator Pepper would permit, but Section 8 (b) (4) (A) was intended to stop (93 Cong. Rec. 4198–4199, 2 Leg. Hist. 1107–1108):

> * * * the case of the New York Electrical Workers' Union, which said, "We will not permit any material made by any other union or by any nonunion workers to come into New York City and be put into any building in New York City." * * *

> * * * [the situation where all] over the United States, teamsters are saying, "We will not handle this lumber, because it is made in a plant where a CIO union is certified." * * *
>
> * * * [the situation where] all over the United States, carpenters are refusing to handle lumber which is finished in a mill in which CIO workers are employed, or, in other cases, in which American Federation of Labor workers are employed.[12]

And, at another point in the legislative debate, Senator Taft, in explaining Section 8 (b) (4) (A), stated (93 Cong. Rec. 4867, 2 Leg. Hist. 1388):

> * * * we are dealing with the checking of deliveries through secondary boycotts or jurisdictional strikes. * * * The trouble is that the man drives up to the delivery point, and because the teamsters' union says that he does not have a teamster's card, then the union in the plant, the unloaders or longshoremen, or whatever they may be will not unload his truck. That is what we are trying to reach in this case. * * *

B. CONGRESS WAS AWARE THAT EMPLOYEE REFUSALS TO HANDLE DISFAVORED PRODUCTS WERE OFTEN ACQUIESCED IN BY THE EMPLOYER, EITHER THROUGH "HOT CARGO" AGREEMENTS OR OTHER ARRANGEMENTS WITH THE UNION

At the time that Congress was considering the product boycotts described above, the practice of securing employer consent in advance of the em-

[12] Senator Morse characterized the latter two situations as "hot cargo" cases, 93 Cong. Rec. 4863, 2 Leg. Hist. 1380. See, also, 93 Cong. Rec. 4131–4132, 2 Leg. Hist. 1056 (Senator Ellender); S. Rep. No. 105, 80th Cong., 1st Sess., p. 22, 1 Leg. Hist. 428.

ployees' refusal to handle disfavored goods, by means of a "hot cargo" clause in the collective bargaining contract, was a well known method of effecting these boycotts. Thus, a compilation of collective bargaining contracts for the years 1926 and 1927, made by the Bureau of Labor Statistics, shows that, even then, there were contracts with clauses permitting the employees represented by the union to refuse to work on "an unfair job," on "nonunion material" or on "work destined for an unfair employer."[13] By 1942, when the Bureau published its next study, clauses of this type had become more widespread, the Bureau reporting that:[14]

> * * * it is often provided in agreements that the employer may not require employees to work on material coming from or destined for manufacturers not operating under union agreements. Other agreements limit the prohibition to material coming from employers who have been declared "unfair" to organized labor by an affiliated union * * *. Another alternative * * * prohibits work on materials coming from or destined for manufacturers whose employees are on strike * * *.

Moreover, obtaining employer acquiescence has long been common practice in the programs of the United Brotherhood of Carpenters and the International

[13] Bulletin No. 448, *Trade Agreements 1926*, United States Bureau of Labor Statistics (Gov't Print. Off., 1927), p. 7; Bulletin No. 468, *Trade Agreements 1927* (Gov't Print. Off., 1928), p. 6.

[14] Bulletin No. 686, *Union Agreement Provisions*, United States Department of Labor, Bureau of Labor Statistics (Gov't Print. Off., 1942), p. 32.

Brotherhood of Teamsters, the unions involved in the incidents brought to Congress' attention (pp. 23–26, *supra*), and the parent bodies of the locals involved in this case and the companion cases, Nos. 127 and 412. Since early in 1900, the United Brotherhood of Carpenters has implemented its union label policy by arrangements and agreements with the contractors and other employers of its members.[15] Similarly, for many years the International Brotherhood of Teamsters has, by contract and otherwise, obtained the cooperation of the employers already organized by it in its further organizing efforts.[16]

Congress was aware of how these unions operated, well before the enactment of the Taft-Hartley amendments. The drive by former Assistant Attorney General Thurman Arnold to apply the antitrust laws to

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[15] See Christie, *Empire in Wood, a History of the Carpenters' Union* (Cornell, 1956), pp. 161–169, 301–304, 312–313; *United States* v. *Brims*, 272 U. S. 549; *Paine Lumber Co.* v. *Neal*, 244 U. S. 459, 469–470; *Bossert* v. *Dhuy*, 221 N. Y. 342, 117 N. E. 582; *United Brotherhood of Carpenters* v. *United States*, 330 U. S. 395, 399.

[16] See Leiter, *The Teamsters' Union* (Bookman Associates, 1957), pp. 175, 249, 264; Hill, *Teamsters and Transportation* (American Council on Public Affairs, 1942), pp. 202–203; Gillingham, *The Teamsters Union on the West Coast* (Institute of Industrial Relations, Univ. of Cal., 1956), pp. 13, 48; Bulletin No. 448, *op. cit.*, p. 196; Bulletin No. 468, *op. cit.*, p. 202; *International Brotherhood of Teamsters, Local 294 (Rabouin d/b/a Conway's Express)* 87 NLRB 972, 1020. An examination of approximately 60 Teamsters' collective bargaining contracts negotiated prior to the enactment of the 1947 amendments to the Act, which were made available by the U. S. Department of Labor, Wages and Industrial Relations Division, revealed that most of them, as here, contained clauses permitting employees to refuse to handle "unfair goods."

the restrictive practices of the unions in the building trades,[17] which commenced in the fall of 1939 and tapered off in 1941 as a result of the decision in *United States* v. *Hutcheson*, 312 U. S. 219, had emphasized the practices of the Carpenters.[18] And in April and May of 1942, after *United States* v. *Local 807, International Brotherhood of Teamsters*, 315 U. S. 521, made plain that the "organizing" tactics of the Teamsters were not subject to regulation under the Anti-Racketeering Act, a Subcommittee of the House Judiciary Committee, headed by Congressman Hobbs, held hearings on bills to amend that Act and to outlaw "illegitimate" labor activities, including secondary boycotts.[19] Witnesses before the Subcommittee repeatedly described the Teamsters' practice of forcing recognition from employers whose employees they did not represent by labeling the employer's products as "hot cargo," with the result that trucking firms, employing Teamsters members, would not handle those products.[20] The passage, in June 1941, of the Cali-

[17] See Arnold, *The Bottlenecks of Business* (Reynal and Hitchcock, 1940), pp. 42, 196–200; 240–259.

[18] See Christie, *op cit.*, pp. 308–315; Proceedings of the Twenty-Fifth General Convention of the United Brotherhood of Carpenters and Joiners of America (April 22–30, 1946), pp. 254–255.

[19] Hearings before Subcommittee No. 3 of the House Judiciary Committee, *Injunctions Against Illegitimate Labor Practices and Outlawing Racketeering*, 77th Cong., 2d Sess., Serial No. 17.

[20] Hearings, n. 19, *supra*, pp. 8, 44–46, 50. One of the witnesses was Joseph B. Eastman, Director of the Office of Defense Transportation, who submitted a lengthy list of cases, taken from the files of the Interstate Commerce Commission, in which unionized motor carriers had refused to pick

fornia statute outlawing "hot cargo" and "secondary boycotts" served further to highlight the existence of "hot cargo" clauses and their use by the Teamsters.[21]

In these circumstances, it is clear that when, in 1947, Congress finally adopted legislation covering product boycotts,[22] it recognized that these boycotts were frequently carried out under cover of "hot cargo" clauses and other forms of employer acquiescence.

C. THERE IS EVERY REASON TO CONCLUDE THAT CONGRESS INTENDED NO EXCEPTION FOR THE SITUATION WHERE THE EMPLOYEE'S REFUSAL WAS ACQUIESCED IN BY THE EMPLOYER

In view of Congress' desire to proscribe all secondary boycotts effected by work stoppages of em-

up or deliver freight to firms declared "hot" by the Teamsters. Hearings, pp. 336–369; Leiter, *op. cit.*, p. 249. See also, the testimony of Assistant Attorney General Arnold, Hearings, *supra*, pp. 402–410, 420–424.

[21] This statute was specifically called to the attention of the Hobbs Subcommittee, Hearings, n. 19, p. 29, *supra*, pp. 135–136. The statute was subsequently held to be unconstitutional by the Supreme Court of California on the ground that it was so vaguely drawn that it appeared to sweep within its ban not only union secondary activities, but also legitimate primary picketing and other activity which the court believed to be protected by the First Amendment. *Ex parte Blaney*, 184 P. 2d 892.

[22] No legislation resulted from the 1942 hearings of the Hobbs Subcommittee. However, the secondary boycott activities there disclosed led to numerous proposals in succeeding sessions of Congress for curbing such activities, culminating in the Case Bill of 1946, the immediate forerunner of the Taft-Hartley amendments. See pp. 43–45, *infra;* Millis and Brown, *From Wagner Act to Taft-Hartley* (Univ. of Chi., 1950), pp. 356–362. The only measure which was enacted during this period was the Hobbs Amendment to the Anti-Racketeering Act (July 1943), which was aimed at extortion by labor unions. See Leiter, *op. cit.*, p. 251.

ployees, without distinguishing between "good secondary boycotts and bad secondary boycotts" (Senator Taft, p. 23, *supra*, and its awareness that such boycotts were frequently carried out with the acquiescence of the employer, it cannot be supposed that Congress contemplated an exception for the latter situation. Since clauses purporting to exempt employees from handling or working on products (or under conditions) disfavored by the union cover a wide variety of situations,[23] recognition of the factor of employer acquiescence as decisive would remove a substantial amount of secondary boycott activity from the reach of Section 8 (b) (4) (A) and (B). And in two cases which Congress repeatedly cited—the New York City case involving the Electrical Workers (p. 25, *supra*), and a San Francisco case involving the Carpenters (1 Leg. Hist. 427; 2 Leg. Hist. 1537, 1622)—the unions not only had the consent, but the active cooperation of the employer.[24] Moreover, an exception for employee work stoppage acquiesced in by the employer would be incompatible with the broad protection which Section 8 (b) (4) (A) and (B) was intended to provide. We turn to these considerations.

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[23] See p. 27, *supra;* Bulletin No. 908–13, *Collective Bargaining Provisions*, United States Department of Labor, Bureau of Labor Statistics (Gov't Print. Off., 1949), pp. 38–45; Collective Bargaining Negotiations and Contracts (Bureau of National Affairs, Washington, D. C.), pp. 77: 5, 77: 352–353.

[24] See *Allen Bradley Co.* v. *Local Union No. 3, International Brotherhood of Electrical Workers*, 325 U. S. 797; *United Brotherhood of Carpenters* v. *United States*, 330 U. S. 395, 399.

1. *Section 8 (b) (4) (A) and (B) was not enacted solely for the benefit of the secondary employer through whose employees the boycott is effected*[25]

In banning secondary boycotts, Congress, to be sure, proposed to protect against disruption the business of the particular secondary employer whose employees would be the immediate target of the union's inducement, *e. g.*, the motor carriers here.[26] But such boycotts affect, in addition to the secondary employer, the other employers who do business with that employer, the public generally, and the primary employer.[27] Congress intended to safeguard these other interests as well.

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[25] Although, as indicated p. 9 n. 5, *supra*, the Board members have varying views as to why a "hot cargo" clause does not privilege conduct otherwise within the purview of Section 8 (b) (4) (A) and (B), they all accept, and start from the underlying premise that the purpose of the section is to afford protection to all employers and persons affected by a secondary boycott, including the general public. See *Local 1976, United Brotherhood of Carpenters (Sand Door and Plywood Co.)*, 113 NLRB 1210, 1216, 1219; *Truck Drivers Local Union No. 728 (Genuine Parts Company)*, Appendix B, pp. 93-94, *infra*.

[26] As Senator Taft stated (93 Cong. Rec. 4198, 2 Leg. Hist. 1107): "There is no reason that I can see why we should make it lawful for persons to incite workers to strike when they are perfectly satisfied with their conditions," and the only basis for complaint is that "their employer happens to be doing business with someone the union does not like or with whom it is having trouble or having a strike."

[27] For example, assuming that a shipment of American Iron oil field equipment passed from one of the carriers here (A) to an intervening carrier (B), who in turn made delivery to the ultimate purchaser (C), the refusal of A's employees would affect not only the business of A, but would also require B

The underlying theory of the Act itself suggests that protection of the public was an important consideration in the enactment of the ban on secondary boycotts. For, as this Court has long recognized, the Act creates "public" and not "private" rights; the "Board as a public agency acting in the public interest * * * is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce." *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 265.[28] The preamble to the Labor Management Relations Act of 1947 (Section 1 (b)), Title I of which contains the amendments to the Act, provides in relevant part that: "It is the purpose and policy of this Act, in order to promote the full flow of commerce * * * to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with

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to discontinue handling, and C to discontinue using, American Iron products; in addition, the inability of C to get the American Iron equipment might well curtail the supply of oil and thereby adversely affect the public generally. Similarly, in No. 127, the refusal of the carpenters to install prefinng doors had an impact beyond Haystad and Jensen (the subcontractor employing the carpenters), affecting, *inter alia*, the sales of these doors by Sand Door and Watson and Dreps, the distributors who handled the doors on their way from the manufacturer to the contractor. And in No. 412, the refusal of the milk dealers to handle Crowley's products necessarily had an impact on the consuming public, and put pressure on Crowley's, the primary employer, to recognize the union.

[28] See, also, *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 362–364, 366; *Garner* v. *Teamsters Union*, 346 U. S. 485, 492–496.

labor disputes affecting commerce." As shown above (p. 25), Senator Taft, illustrating the need for the secondary boycott provisions, pointed out that, if employees were permitted to strike merely because their employer handled disfavored goods, "there can be a chain reaction that will tie up the entire United States in a series of sympathetic strikes." Similarly, Representative Landis, one of the managers of the bill in the House, justified a ban on secondary boycotts on the ground that (93 Cong. Rec. A-1222, 1 Leg. Hist. 583): "Secondary boycotts have had the effect of throwing a great many innocent people out of work. As a result of these secondary boycotts many of our citizens have been deprived of milk, bread, meat, fruits, vegetables, and other essentials of life." Moreover, in explaining the addition to the Act of Section 10 (l), which empowers and directs the Board to apply for immediate injunctive relief against conduct which appears to be violative of Section 8 (b) (4), the Senate Report states (S. Rep. No. 105, 80th Cong., 1st Sess., p. 8, 1 Leg. Hist. 414):

> Because of the nature of certain * * * practices, especially jurisdictional disputes, and *secondary boycotts* * * * for specifically defined objectives, the committee is convinced that additional procedures must be made available under the National Labor Relations Act *in order adequately to protect the public welfare which is inextricably involved in labor disputes.*
>
> * * * * *
>
> Hence we have provided that the Board, *acting in the public interest and not in vindication of purely private rights*, may seek injunctive relief

> In * * * the case of *strikes and boycotts defined as unfair labor practices.* [Emphasis added.]

Furthermore, the attempts by Senators Ball and Aiken to permit the farmer and the small businessman affected by a secondary boycott to secure injunctive relief without first resorting to the Board likewise show that the secondary boycott provisions were not designed merely for the benefit of the particular secondary employer whose employees are engaged in the boycott, but also for the protection of other employers and persons, including the primary employer. Thus Senator Ball, in proposing an amendment which would have provided a private injunctive remedy against such activity, stated (93 Cong. Rec. 4835–4836; 2 Leg. Hist. 1350):

> * * * in the great majority of cases a secondary boycott or a jurisdictional strike is conducted simply by employees of employer A, B, or C grouped into a union and assuming for themselves a prerogative for using their economic force to dictate to the employees of employer X the terms and conditions under which those employees shall work. The employees are the primary objective and the primary victim for secondary boycotts and jurisdictional strikes. * * * [A] great many employers are the secondary victims, and quite a number of them have been driven out of business by such practices.
>
> * * * the pending amendment would simply give to those employees and to their employers the right to go directly into court to protect their right to freedom from this kind of racketeering pressure * * *.

He added (93 Cong. Rec. 4838, 2 Leg. Hist. 1354):

> As I said before, farm producers and small businesses and their employees are the main victims of secondary boycotts, jurisdictional strikes, and organizational boycotts. * * * [They] do not have the resources to enable them to last out the 2 to 6 weeks' delay which would intervene before they could possibly get relief under the committee bill. It is such persons and their rights that we are trying to protect.

Making a similar proposal, Senator Aiken explained that (93 Cong. Rec. 4860, 2 Leg. Hist. 1375):

> We have had reports for many years of cases involving farmers who have worked through the year raising a crop and have taken it to market, only to run into a secondary boycott or a jurisdictional strike in existence at the place at which they were supposed to deliver the crop. Consequently they have lost it. * * *
>
> For that reason I * * * provide that * * * the farmer * * * may appeal to the courts for an injunction * * *.[29]

These proposals were rejected only after Senator Taft offered the substitute permitting persons injured by secondary boycotts to sue for damages, as well as obtain injunctive relief through the Board (Section 303 of the Labor Management Relations Act; 93 Cong. Rec. 4843, 4858, 2 Leg. Hist. 1365, 1370–1371). See *DiGiorgio Fruit Corp.* v. *National Labor Relations Board*, 191 F. 2d 642, 644–645 (C. A. D. C.), cer-

[29] See also, S. Rep. No. 105 on S. 1126 (Supplemental Views), p. 54, 1 Leg. Hist. 460.

tiorari denied, 342 U. S. 869; *United Brick & Clay Workers* v. *Deena Artware, Inc.*, 198 F. 2d 637, 643–644 (C. A. 6), certiorari denied, 344 U. S. 897.[30]

The broad purpose of the secondary boycott provisions is further attested by the way in which Section 8 (b) (4) (A) and (B) defines the proscribed objects. The illegal object specified in subsection (A) is "forcing or requiring * * * *any employer or other person*" to cease doing business with another. (Emphasis added.) This language comprehends not only the employer whose employees may be induced by the union, but other employers and persons who use or handle the "hot goods" (see n. 27, p. 32, *supra*). Similarly, subsection (B) defines the illegal object as "forcing or requiring *any other* employer to recognize or bargain with a labor organization" unless such labor organization has been certified by the Board. (Emphasis added.) The words "any other employer" obviously refer to the employer with whom the union has its primary dispute (here American Iron), the

[30] Cf. *National Labor Relations Board* v. *Associated Musicians*, 226 F. 2d 900, certiorari denied, 351 U. S. 962, where the Second Circuit recognized that the secondary boycott provisions of the Act were intended to protect the primary employer, and not solely the secondary employer immediately involved, when it rejected the contention "that the business of the primary employer should not be considered in determining jurisdiction of secondary boycotts" (p. 907). The Court stated (*ibid.*): "We think the better view is that the secondary activity is but an extension of the labor dispute with the primary employer and that the businesses of both employers are to be considered in determining jurisdiction of the secondary activity."

purpose of the subsection being to bar secondary pressure on him to grant recognition.[31]

In sum, by Section 8 (b), (4) (A) and (B), Congress attempted "to narrow the area of industrial strife, and thus to safeguard the national interest in the free flow of commerce * * *." It has done so by broadly sweeping within the Section's "prohibition an entire pattern of industrial warfare deemed by Congress to be harmful to the public interest"—one phase of this pattern being the type of product boycott involved here. *Printing Specialties and Paper Converters Union, Local 388* v. *LeBaron*, 171 F. 2d 331, 334 (C. A. 9). Congress believed that the public interest would best be served by confining the "area of industrial strife", insofar as possible, to the employer with whom the union had its primary dispute and by precluding the union from enlisting the aid of the employees of other secondary employers. To the extent that these secondary employers might be "neu-

[31] Section 10 (b) of the Act, which permits a charge to be filed by "any person" (cf. *Teamsters Union* v. *New York, N. H. & Hartford Railroad Co.*, 350 U. S. 155, 160), insures that any employer or individual affected by a secondary boycott may invoke the protection of Section 8 (b) (4) (A) and (B). In this case, the charge was filed by the primary employer, American Iron (R. 2, 11); in No. 412 the charge was also filed by the primary employer (Crowley's Milk); but in No. 127 the charge was filed by Sand Door and Plywood Company, a secondary employer whose business was affected by the boycott. See, also, Section 303 (b) of the Labor Management Relations Act, 1947, which, in providing for suits for damages in respect to the same conduct made an unfair labor practice under Section 8 (b) (4) (p. 36, *supra*), permits such suit to be instituted by "[w]hoever shall be injured in his business or property by reason of" the illegal activity.

trals," Congress desired to avoid having them involuntarily conscripted, through the action of their employees, into the union's dispute with the primary employer. However, Congress' concern was not so narrowly circumscribed or limited solely to this situation. For, even where the conscription of the secondary employer was not involuntary—where, for example, he had a "hot cargo" agreement with the union—the boycott would nevertheless affect other persons wholly unconcerned in the union's dispute with the primary employer,[32] and would exert leverage on the primary employer to accede to the union's demands. Congress concluded that, apart from the desires of the secondary employer immediately involved, it was not fair to these persons or to the public to permit the union to use "secondary" weapons to further its side of the dispute with the primary employer.

2. *To sanction employee refusals acquiesced in by the employer would obliterate the protection intended for the other interests*

The compelling evidence that Section 8 (b) (4) (A) and (B) was enacted for the benefit of persons in addition to the secondary employer immediately involved leads necessarily to the conclusion that Congress

[32] Hence, even if the acquiescence of the secondary employer whose employees were induced by the union removed him from that category, Section 8 (b) (4) (A) and (B) would still be according protection to "the business of a third person who is *wholly unconcerned* in the disagreement between an employer and his employees." 93 Cong. Rec. 4198, 2 Leg. Hist. 1106 (Senator Taft; emphasis added). See, also, 95 Cong. Rec. 8709. In any event, as we have shown (pp. 32–37, *supra*), this description is merely illustrative of, and not exhaustive of, the purposes of the section.

did not intend an exception for the situation in which the secondary employer acquiesces in the employee refusal. For, "if the purpose of the Act is broader, to protect the interest of the others, whether the employer who is the union's primary objective, or the public at large, then, obviously contractual waiver by [one] party * * * could be of no moment." *Alpert* v. *United Brotherhood of Carpenters*, 143 F. Supp. 371, 374–375 (D. Mass.).[33] Otherwise, the other interests sought to be safeguarded by Section 8 (b)(4) (A) and (B) would be obliterated without the consent of the persons affected. The section, *person" to cease doing business with another.* [Emcontrary to the manifest legislative purpose, would be limited to the function of protecting the interests of the secondary employer directly involved in the boycott.

D. THE LANGUAGE OF SECTION 8 (b) (4) (A) AND (B) MAY BE CONSTRUED IN A MANNER CONSISTENT WITH THE SECTION'S LEGISLATIVE HISTORY AND THE CONGRESSIONAL OBJECTIVES

In the light of the considerations set forth above, pp. 22–40, we turn to the language of Section 8 (b)(4) (A) and (B). As noted at the outset (pp. 17–18; 19, n. 8, *supra*), it proscribes a union from inducing or encouraging employees to engage in "a strike or a concerted refusal in the course of their employment," for an object (A) of "forcing or requiring * * * any employer or other person" to cease handling the

[33] See, also, *Douds* v. *Milk Drivers and Dairy Employees Union Local 584*, 40 LRRM 2669, 2672 (C. A. 2, concurring opinion of Lumbard, J.); *National Labor Relations Board* v. *Local 11, United Brotherhood of Carpenters*, 242 F. 2d 932, 936 (C. A. 6).

products of or doing business with any other person, or (B) of "forcing or requiring any other employer" to recognize a labor organization as the representative of its employees though that organization has not been certified by the Board. The court below (and similarly the Second Circuit in *Milk Drivers and Dairy Employees Local Union No. 338 v. National Labor Relations Board*, 245 F. 2d 817, petition for writ of certiorari pending, No. 412, this Term) concluded that, despite the showing of a broad Congressional purpose to reach "secondary" weapons, this language imports the factor of employer non-consent into Section 8 (b) (4) (A) and (B). In its view, employees cannot be said to "strike" or concertedly refuse "in the course of their employment," or to "force or require" action on the part of any employer, when their refusal to work has been consented to by the employer in a "hot cargo" agreement with the union.[34] This conclusion, we submit, is erroneous.

1. *The language of Section 8 (b) (4) (A) and (B) does not limit the section to situations where the work stoppage is opposed by the employer*

To read the language of Section 8 (b) (4) (A) and (B) as covering only such work stoppages as are without the consent of the employer, is to construe the section in a "spirit of mutilating narrowness"

[34] As summed up by the Second Circuit (245 F. 2d at 820), the "language is clear: there is no violation of § 8 (b) (4) unless the union encourages the employees to *coerce* the secondary employer. Where the employees are encouraged only to exercise a valid contractual right to which the employer has agreed there is no coercion."

(*United States* v. *Hutcheson*, 312 U. S. 219, 235). Reading the language, instead, so as to give "hospitable scope" to Congress' purpose (*ibid;* and see *Black* v. *Magnolia Liquor Co.*, No. 14, this Term, decided November 12, 1957), it does not import into the statute the requirement that the employee refusal induced by the union be opposed by the employer.[35]

Although the terms "strike" and "concerted refusal" usually presuppose action which is contrary to the employer's will (see the dissenting opinion of Judge Prettyman, R. 201), it does not follow that these terms, at least the term "concerted refusal," can only be interpreted in this manner. Literally, the union induces a concerted refusal by employees, in the course of their employment, to perform work whenever it requests them, while on the job, not to perform a task. In this sense, it is irrelevant whether the employer has consented to the refusal or not, the significant fact being that the union has encouraged it. In other words, a refusal directed against the goods or the work task, rather than against the employer, would satisfy the statutory requirement of a "concerted refusal" by employees.

Giving the term "concerted refusal" this interpretation is justified because it achieves the broad Congressional purpose and avoids the consequences, de-

[35] Preliminarily, it may be noted that the language contains no express qualification for cases in which the inducement is pursuant to a "hot cargo" clause or otherwise consented to by the employer. Compare the proviso to Section 8 (a) (3), where Congress, when it desired to except private contractual arrangements from the Act's provisions, said so specifically. See, also, the provisos to Sections 8 (a) (2), 8 (b) (1) (A), and 8 (b) (4) (D).

structive of that purpose which would flow from reading the term as comprehending only those refusals which are opposed by the employer. For the latter reading results, as noted above, in foreclosing the other interests sought to be safeguarded by Section 8 (b) (4) (A) and (B), without the consent of those affected. Moreover, interpreting the term "concerted refusal" as not requiring that the refusal coerce the employees' employer is consistent with the fact that it "was the *objective* of the union's secondary activities * * * and not the *quality of the means* employed to accomplish that objective, which was the dominant factor motivating Congress in enacting [Section 8 (b) (4) (A) and (B)]." *International Brotherhood of Electrical Workers* v. *National Labor Relations Board,* 341 U. S. 694, 704, quoting with approval from *United Brotherhood of Carpenters,* 81 NLRB 802, 812. That is to say, just as the "substitution of violent coercion in place of peaceful persuasion would not in itself" bring primary picketing within the reach of Section 8 (b) (4) (A) or (B) (*National Labor Relations Board* v. *International Rice Milling Co.,* 341 U. S. 665, 672), so, also, coercion of the employer is irrelevant to the question whether a refusal by his employees constitutes a "concerted refusal" within the meaning of the section.

In addition, there is persuasive evidence that Congress viewed the term "concerted refusal" as covering employee refusals acquiesced in by the employer, adding the term "strike" to insure that the ban on secondary boycotts would also reach employee refusals which the employer opposed. Thus, the Case Bill,

which was the forerunner of the Taft-Hartley amendments to the Act,[36] contained, as it left the House, a provision banning secondary boycotts, which, in relevant part, read as follows (H. R. 4908, 79th Cong., 2d Sess., Sec. 13 (a)):

> * * * it shall be unlawful (1) by means of a concerted refusal to use, handle, or otherwise deal with articles or materials produced or manufactured by any person, to induce or require or to attempt to induce or require another person to recognize, deal with, comply with the demands of, or employ members, of any labor organization; * * *

In the Senate, Senators Ball, Taft and Smith (who, in the next session of Congress, were instrumental in securing adoption of the Taft-Hartley amendments), tried to achieve the same result by making it a violation of the antitrust laws for a labor organization (S. Rep. No. 1177, 79th Cong., 2d Sess., Part 2, p. 14):

> by strikes, or threats of strikes, * * * or by concerted refusal to use, handle, transport, or otherwise deal with specified articles or materials, to force or require any employer, or any other individual, corporation or partnership to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer.[37]

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[36] See Millis and Brown, *From the Wagner Act to Taft-Hartley* (Univ. of Chi., 1950), pp. 360-362; n. 22, p. 30, *supra*.

[37] The report accompanying this amendment states that the provision would make all secondary boycotts by unions in restraint of commerce unlawful, and adds: "The secondary boycott takes many forms, from the *'hot cargo' embargo used*

In explaining why this proposal, unlike the House version, added the word "strikes" to "concerted refusal," Senator Ball stated (92 Cong. Rec. 5724):

> We had to include the word "strikes" because obviously if the construction union says, "We will put on our unfair list this product made by General Electric or Westinghouse; we will not use it," and the employer says, "Well, I will go along," and he merely stacks it up in the corner, that is a concerted refusal to use. But if the employer says, "You use these, or else you are through working for me," and the workers strike, that is just as effective as a concerted refusal to handle, and there must be included in this picture the use of the strike weapon where it is used to enforce a secondary boycott. * * *.

Interpreting "concerted refusal" as covering all union-induced employee refusals, whether or not approved by the employer, does not clash with Section 8 (b) (4)'s requirement that the employees' concerted refusal be "in the course of their employment." The phrase "course of their employment" need not be regarded as merely a definition of the work tasks which the employer has consented to have his employees perform. Since Congress did not wish, by Section 8 (b) (4) (A) and (B), to interdict union appeals to the public (which, of course, includes individuals who are employees) to refrain from patronizing disfavored

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by the teamsters unions, to the refusal of unions to handle goods made by nonunion employees or even by employees belonging to a rival union. * * *." S. Rep. No. 1177, 79th Cong., 2d Sess., Part 2, p. 14. (Emphasis added.)

employers or purchasing their products (see *National Labor Relations Board* v. *Service Trade Chauffeurs*, 191 F. 2d 65, 68 (C. A. 2)), there is good reason to conclude that "in the course of employment" was inserted "to distinguish between employees in their capacity as employees and employees in their capacity as consumers." *Local 1976, United Brotherhood of Carpenters (Sand Door and Plywood Co.)*, 113 NLRB 1210, 1217, quoted with approval in *National Labor Relations Board* v. *Local 11, United Brotherhood of Carpenters*, 242 F. 2d 932, 936 (C. A. 6). Similarly, as shown by *Joliet Contractors Ass'n* v. *National Labor Relations Board*, 202 F. 2d 606, 609 (C. A. 7), certiorari denied, 346 U. S. 824, the term serves the function of excluding from Section 8 (b) (4) (A) and (B) employee refusals to work which occur "prior to the establishment of an employer-employee relationship." Moreover, as Judge Prettyman pointed out in his dissent herein (R. 202–203), to interpret the phrase "in the course of their employment" as a reference to the work tasks which the employer has hired his employees to perform would permit the parties to give legality to all kinds of acts forbidden by the statute by the simple device of fixing the scope of employment, *e. g.*, a contract provision exempting from the course of employment concerted refusals to perform services for the purpose of forcing an employer to assign work to one class of employees rather than to another—conduct which would otherwise violate the ban against jurisdictional strike action contained in Section 8 (b) (4) (D) of the Act. See, also,

Genuine Parts Company, Appendix B, pp. 97–98, *infra*.

Nor are the proscribed objects defined in subsections (A) and (B) of Section 8 (b) (4) limited to situations where there is coercion of the employer whose employees have been induced by the union. As we have shown (pp. 37–38, *supra*), the proscription contained in those subsections has meaning irrespective of the acquiescence of that particular employer. Thus here, even assuming that in view of the "hot cargo" clauses there may have been no "forcing or requiring" of the motor carriers themselves,[38] the refusal of their employees to handle American Iron freight did "force or require" other persons to stop handling American Iron products (see n. 27, p. 32, *supra*). Similarly, in No. 127, even assuming that the refusal of the carpenters to handle prehung doors may have been voluntarily acquiesced in by their employer, the refusal did "force or require" Sand Door and Watson and Dreps, who did not consent, to curtail their shipments of these doors (*ibid.*). In No. 412, despite the assumed acquiescence of the milk dealers, the refusal of their employees to handle Crowley's products achieved the result prohibited by Section 8 (b) (4) (B), *i. e.*, putting pressure on Crowley's (the primary employer) to recognize the union though it had not been certified.

In sum, the language of Section 8 (b) (4) (A) and (B) does not require that, contrary to Congress' evi-

[38] However, insofar as four carriers refused to adhere to the clause, there was compulsion even of them (see pp. 5–7; Judge Prettyman's dissent, R. 201–203).

dent, the reach of the section be confined to situations where the secondary employer is coerced."[39]

[39] The terms "boycott" or "secondary boycott" have been defined in many different ways, sometimes as presupposing coercion of the secondary employer immediately involved, and other times as not. These conflicting and perhaps confusing definitions were, no doubt, among the factors which prompted Senator Taft to say, during the legislative debates (*supra*, p. 23), that the Senate Committee had "never succeeded in having anyone tell us any difference between different kinds of secondary boycotts", and hence "we have so broadened the provision dealing with secondary boycotts as to make them an unfair labor practice." It is fair to say, we think, that Congress adopted the all-inclusive phrase "forcing or requiring any employer" to avoid any distinction based upon whether or not pressure was exerted on the immediate secondary employer. Cf. *National Labor Relations Board* v. *Wine, Liquor & Distillery Workers Union*, 178 F. 2d 584, 586–587 (C. A. 2); *Printing Specialties and Paper Converters Union, Local 388* v. *LeBaron*, 171 F. 2d 331, 334 (C. A. 9). Laidler, in his classic work, *Boycotts and the Labor Struggle* (N. Y., John Layne Co., 1913) defined a "secondary boycott" as a "combination of workmen to *induce* or *persuade* third parties to cease business relations with those against whom there is a grievance," and uses the term "compound boycott" to refer to a situation "where the workmen use *coercive* and *intimidating* measures, as distinguished from mere persuasive measures in preventing third parties from dealing with the boycotted firm" (p. 64). On the other hand, this Court, in *Duplex Co.* v. *Deering*, 254 U. S. 443, 466, characterized the situation where persuasion is used as a "primary boycott," and reserved the term "secondary boycott" for the situation where coercion is used. Thus, it pointed out that the union action in that case was in substance a "secondary boycott," that is, "a combination not merely to refrain from dealing with complainant, or to advise or by peaceful means persuade complainant's customers to refrain ('primary boycott'), but to exercise coercive pressure upon such customers, actual or prospective, in order to cause them to withhold or withdraw patronage from complainant through fear of loss or damage to themselves should they deal with it" (*ibid.*). Still an-

2. The contentions which may be advanced against this interpretation do not impair its validity

The foregoing interpretation of the language of Section 8 (b) (4) (A) and (B) results in a situation where, assuming that the Act does not invalidate the "hot cargo" clause itself, it would nevertheless preclude the enforcement of that clause by the union through employees. It has been said that this result is anomalous. Apart from the fact that a majority of the Board is now of the view that the "hot cargo" clause itself is invalid (see pp. 55–56, *infra*), at least in the circumstances of this case, we think the criticism unsound.

(a) The court below reasoned that the union presumably paid a consideration for the "hot cargo" clause by concessions at the bargaining table; and that the clause would be rendered virtually worthless if the union could not implement it, when the occasion arose, by appeals to employees. Indeed, the argument runs, to preclude the union from doing so, would be to encourage lawlessness in industrial relations. (R. 198–199, 203.)

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other view is that of Teller, who classifies the type of conduct familiarly known as a labor boycott as "concerted refusal to deal," "efforts at persuasion," and "efforts at coercion." See Teller, *Labor Disputes and Collective Bargaining* (Baker Voorhis, 1940), Vol. 1, pp. 454–457, 448–449. See, also, Frankfurter and Greene, *The Labor Injunction* (MacMillan, 1930), pp. 42–43; Wolman, *The Boycott in American Trade Unions* (Johns Hopkins University Studies in Historical and Political Science, 1916), pp. 10–13; Oakes, *Organized Labor and Industrial Conflicts* (Lawyers Co-Operative Pub. Co., 1927), § 427; Hellerstein, *Secondary Boycotts in Labor Disputes*, 47 Yale L. J. 341 (1938).

But this argument assumes (cf. R. 198, 199) that the secondary boycott provisions of the Act were enacted for the exclusive benefit of the particular secondary employer whose employees have been induced by the union. However, we have established that this premise is erroneous (pp. 32–39, *supra*). Accepting the contrary view that Section 8 (b) (4) (A) and (B) was intended to protect all persons affected by the boycott, including the public, the private contractual arrangements of the union and one of the persons affected cannot be decisive; they must give way to the extent necessary to permit the purposes of the section to be fully effectuated. The fact that one employer has agreed to the inducement and the union has paid a consideration for this agreement cannot privilege the inducement, since it would be felt beyond this employer, affecting the other persons who are entitled to, and have not waived, the benefits of the section. Nor is it significant (as we assume at this point) that the Act may not have banned the "hot cargo" clause as such. For Congress, in requiring a private agreement to yield in order to effectuate a public purpose, can go as far as it believes necessary (see pp. 53–54, *infra*).[40]

(b) The second contention which may be advanced in opposition to the Board's interpretation may be

[40] In other situations where a private contract has been found to impinge on the public rights conferred by the Act, the contract was held to be ineffective only for purposes of the Board proceeding, and no determination was made as to whether it retained validity for other purposes. See *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 365–367.

summarized as follows: Although Section 8 (b) (4) (A) and (B) bans union inducement of employees to engage in a secondary boycott, it does not preclude the union from carrying out its boycott through appeals or threats addressed solely to the *employer*.[21] If the Act does not invalidate the "hot cargo" clause itself, but merely precludes the union from enforcing it through the employees, the union remains free to enforce the clause through the employer, *e. g.*, by appealing to him to order his employees to abide by the contract, or by threatening him with a suit for breach of contract. Since this method of enforcement might also adversely affect other neutral employers and the public, Congress could not have intended to interdict enforcement through employee action.

But, as the Ninth Circuit observed in *National Labor Relations Board* v. *Local 1976, United Brotherhood of Carpenters*, 241 F. 2d 147, 153, now before this Court in No. 127: "An employer may well remain free to decide, as a matter of business policy, whether he will accede to a union's boycott demands, or if he has already agreed to do so, whether he will fulfill his agreement. An entirely different situation, however, is presented * * * when it is sought to influence the employer's decision by a work stoppage of his employees." Thus Congress could have believed that there was little chance that the union's

[21] See *Rabouin d/b/a Conway's Express* v. *National Labor Relations Board*, 195 F. 2d 906, 911-912 (C. A. 2); *National Labor Relations Board* v. *Local 11, United Brotherhood of Carpenters*, 242 F. 2d 932, 935 (C. A. 6); cf. *Schatte* v. *International Alliance*, 182 F. 2d 158, 165 (C. A. 9).

boycott demand would succeed—with the resultant impact on other parties which Congress sought to avoid—if the union were unable to back up its demand on the employer by threat of work stoppage. Furthermore, even where the employer agrees to the union's boycott demand and accepts a "hot goods" clause, it does not follow that he will share the union's view as to whether a particular case is encompassed thereby. As the facts here show, both Time and Gillette had ordered their men to handle American Iron freight because they had doubts as to whether such freight was "unfair" within the meaning of their contract, and had attempted without success to obtain the Teamsters view on this question (pp. 6–7, *supra*). Moreover, the employer may feel that, notwithstanding the clause, the handling of certain goods is required by supervening law. Gillette, for example, was of the opinion that "according to the Interstate Commerce Commission we had to handle the freight" (R. 145), and the clause itself (R. 187) contained the proviso "provided this is not a violation of the Labor Management Relations Act of 1947." Or the employer may conclude that the business advantage of handling certain "hot goods" outweighs the damages that may be recovered by the union for breach of contract. As Hall's representative testified, his company wished to handle the American Iron freight because "that's what we are in business for" (R. 154).

Congress could well have concluded that such questions concerning the applicability of the "hot cargo"

clause in a particular situation should be resolved by direct negotiation between the employer and the union without strike action pressure, even though the employer may ultimately agree with the union's view. Accordingly, it could reasonably have permitted employer enforcement of "hot cargo" contracts while at the same time banning the union from inducing employees directly. For the employer's decision in a particular case can hardly be a free one when it is made under the pressure of an accomplished work stoppage by his employees.[42]

Finally, it "is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute." *Colgate-Palmolive-Peet Co. v. National Labor Relations Board*, 338 U. S. 355, 363. Whatever may be the situation respecting union-employer action, the statute clearly reaches union inducement of employee work stoppages, and, when such a situation is presented, it cannot be immunized by asserting that

[42] Nor is the Board's view that Section 8 (b) (4) (A) and (B) bars union enforcement of a "hot cargo" clause through employees affected by the fact that, after the enactment of this section, bills were introduced in Congress for the purpose of specifically outlawing boycotts implemented through hot cargo clauses. The first such bill (100 Cong. Rec. 6125, May 6, 1954) was introduced at a time when the Board was still adhering to its *Conway* decision (p. 19, *supra*). In introducing the later bill, its sponsor, Senator Curtis, explained (102 Cong. Rec. 8021–8022, May 14, 1956) that Congress in 1947 had intended to outlaw secondary boycotts irrespective of "hot cargo" clauses and that, although the Board was now of this view, it had not been so originally; he believed that an amendment was necessary to insure that there would be no further doubt, or change of position, on this issue. Cf. *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 47.

other situations may have been left free.[43] We submit that it is no more illogical to hold that Section 8 (b) (4) (A) and (B) precludes enforcement of "hot cargo" agreements through employee work stoppages, but leaves open the possibility of employer enforcement, than it is to hold (as do the cases cited in n. 41, p. 51, *supra*) that the section reaches strikes but not strike threats addressed to the employer. Compare, also, the holding in *Joliet Contractors Ass'n* v. *National Labor Relations Board*, 202 F. 2d 606, 608–609, 612 (C. A. 7), certiorari denied, 346 U. S. 824, that union bylaws barring work on preglazed sash are not illegal *per se*, although they furnish inducement for a strike or a concerted refusal to work; however, the bylaws do become violative of the Act when employees, after they have entered into an employment relation, undertake to comply therewith, for then the inducement satisfies the "in course of their employment" requirement of Section 8 (b) (4)."

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[43] "We have frequently said that the legislative authority, exerted within its proper field, need not embrace all the evils within its reach." *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 46.

[44] The converse position that union enforcement of a "hot cargo" clause is not violative of Section 8 (b) (4) (A) and (B) has its logical difficulties too. For, although this position assumes that such a clause grants immunity from the reach of Section 8 (b) (4) (A) and (B), it leaves open the possibility that a strike to obtain such clause would nevertheless be violative of that section, since it would be seeking objects proscribed thereby. See Note, *Hot Cargo Clauses as Defenses to Violations of Section 8 (b) (4) (A) of the Labor Management Relations Act*, 64 Yale L. J. 1201, 1205; *Chauffeurs, Local Union No. 135 (Pittsburgh Plate Glass Co.)*, 105 NLRB 749, 744, n. 6; cf. *Local 47, International Brotherhood of Teamsters (Texas Industries, Inc. and T. C. Bateson Construction Co.)*, 112 NLRB 923, 935.

E. IN ANY EVENT, IN THE CIRCUMSTANCES OF THIS CASE, THE CONSENT GIVEN IN THE "HOT CARGO" CLAUSE IS LEGALLY INEFFECTIVE BECAUSE THE CLAUSE ITSELF IS INVALID

We also suggest that the statutory requirements would be met here, even if the language of Section 8 (b) (4) (A) and (B) were interpreted as covering only work stoppages *not* consented to by the employer, for the consent manifested in the "hot cargo" clause in this case was not entitled to legal recognition. As pointed out in n. 5, p. 9, *supra*, a majority of the Board is now of the view that a "hot cargo" clause is itself invalid, at least where, as here, the employer-party to the clause is a common carrier subject to the Interstate Commerce Act. Thus, as Chairman Leedom and Member Jenkins explained in their opinion in *Genuine Parts* (Appendix B, pp. 90–94, *infra*), the Interstate Commerce Act, Part II, Section 216 (49 U. S. C. § 316), imposes on common carriers the obligation to serve without discrimination, and a "hot cargo" clause is incompatible with this obligation, for it constitutes advance consent to treat shippers designated "unfair" by the union differently from other shippers. In their view, therefore, even though the National Labor Relations Act may leave a carrier free to enter into a "hot cargo" agreement with a union, the policy of the Interstate Commerce Act, which the Board must take into account, would invalidate such agreement.[45] Moreover, as Member

[45] Cf. *Galveston Truck Line Corp.* v. *Ada Motor Lines, Inc.*, No. MC-C-1922, Report and Recommended Order issued by ICC Hearing Examiner on April 8, 1957. Oral argument in this case, which involves action of the Teamsters local herein and cooperating motor carriers, was heard by the Interstate Commerce Commission on November 7, 1957 (41 LRR 21).

Rodgers explained in his opinion in *Genuine Parts* (Appendix B, pp. 106–114, *infra*), it is his view that, even though the National Labor Relations Act itself does not specifically prohibit the execution of a "hot cargo" clause, the clause undertakes to secure an exemption for conduct which Congress, in that Act, concluded was inimical to the public interest and required restraint. In his view, therefore, the clause is contrary to the policy of the National Labor Relations Act itself, and invalid under the settled principle that wherever "private contracts conflict with [the Board's] functions, they obviously must yield or the Act would be reduced to a futility." *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332, 337. Cf. *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, 704–705.

If the consent to the "hot cargo" clause should be deemed legally ineffective, it would follow, of course, that the union's conduct in this case constituted a violation of Section 8 (b) (4) (A) and (B). See *National Labor Relations Board* v. *Washington-Oregon Shingle Weavers*, 211 F. 2d 149 (C. A. 9).

II

IRRESPECTIVE OF THE CONCLUSION REACHED UNDER POINT I, THE MACHINISTS' INDUCEMENT OF THE CARRIER EMPLOYEES WAS VIOLATIVE OF SECTION 8 (b) (4) (A) OF THE ACT

A. EVEN IF THE "HOT CARGO" CLAUSE PRIVILEGED THE TEAMSTERS' INDUCEMENT OF THE CARRIER EMPLOYEES, IT DID NOT IMMUNIZE THE MACHINISTS' INDUCEMENT OF THOSE EMPLOYEES

Assuming, contrary to our argument under Point I, that the Teamsters' inducement of the motor carrier

employees was removed from the reach of Section 8 (b) (4) (A) because of the "hot cargo" clause in the carriers' contracts with the Teamsters, it does not follow, as petitioner in No. 324 contends, that the clause also privileged the Machinists' inducement of those employees. We submit that the court below correctly held that the clause did not protect the Machinists union, which was neither a party to the contracts containing the "hot cargo" clause nor the representative of any of the carrier employees.

If a "hot cargo" clause may be said to permit the *contracting* union to induce the employees represented by it not to handle goods covered by the clause, such a conclusion must rest on the view that the terms "strike or a concerted refusal in the course of their employment" presuppose action contrary to the will of the employees' employer. But, assuming, *arguendo*, that the employer, by virtue of the "hot cargo" clause, consented to let the bargaining representative of his employees interrupt their handling of certain goods, there is no reason for assuming that the employer's consent goes so far as to sanction such action on the part of a stranger union.

In the first place, the contracts between the Teamsters and the motor carriers (Teamsters Exh. 1, R. 187) suggest the contrary, referring only to the rights and duties of that union and its members. And the Machinists, when they were attempting to induce the carrier employees not to handle American Iron freight (pp. 4–5, *supra*), did not appear to interpret the scope of the contracts differently, for at no time did they

invoke or purport to rely on the "hot cargo" clause therein.

Secondly, as pointed out in *Douds* v. *Local 707, etc. International Brotherhood of Teamsters*, S. D. N. Y., September 24, 1957 (Herlands, J.):

> The contracting union, as the sole collective bargaining agent for the particular secondary employees, occupies a position vis-a-vis the secondary employer that necessarily excludes the claim of any other of an untold number of unions to invoke the hot cargo clause contained in the collective bargaining agreement * * *. * * * the contracting union is familiar with the conditions prevailing in each union shop. It can make intelligent decisions appropriate to each place of employment. It can determine and evaluate the factors of economic benefit or detriment to itself, its members and the cause of organized labor in general when it decides any course of action. The decision to invoke a hot cargo clause, therefore, is not mechanical or clerical. It is fraught with serious consequences to the employees and their unions, no less than to the affected employer. The secondary employer, his employees and their union must be protected against intermeddlers.

Accordingly, contrary to the view of the dissenting judge below (R. 203-204), the advance consent given in the "hot cargo" clause by the motor carriers cannot properly be regarded as extending to the action of a stranger union like the Machinists. The efforts of that union to induce the carrier employees to refrain from handling goods covered by the clause were not authorized by the carriers. Hence, the Machinists'

action would be subject to Section 8 (b) (4) (A) even if similar action taken by the Teamsters, the contracting union, were not so regarded.

B. THE MACHINISTS' INDUCEMENT OF THE CARRIER EMPLOYEES WAS NOT PRIMARY ACTIVITY, OUTSIDE THE PURVIEW OF SECTION 8 (b) (4) (A)

As *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U. S. 665, recognizes, the Machinists' picketing at the plants of American Iron (p. 4, *supra*), the employer with whom the union had its dispute, falls outside the purview of Section 8 (b) (4) (A). Although such picketing is not without its impact on neutral employees, it is to be treated as an incident of the union's right to engage in so-called traditional primary activity, which Congress did not intend to preclude. The Machinists' alternative contention is that, since its picketing at the carriers' docks was limited to times when the American Iron truck was making deliveries there and was confined to the vicinity of that truck, this activity, too, must be regarded as traditional primary activity, and thus exempt from Section 8 (b) (4) (A). We submit that the court below correctly concluded (R. 201) that "there is substantial evidence to sustain the findings of the Board" that the Machinists' activity at the carriers' docks was "secondary" and not "primary," its basic purpose being to induce the carrier employees to exert pressure on their employers to cease doing business with American Iron.

Thus, although the separate plants of American Iron afforded the Machinists ample opportunity to reach the non-striking American Iron employees and

to picket that Company, the union extended the picketing to the premises of secondary employers where it would necessarily have an impact on secondary employees. See *National Labor Relations Board* v. *United Steel Workers*, 41 LRRM 2181, 2183–2184 (C. A. 1, December 5, 1957). Moreover, the manner of the picketing, instead of minimizing this impact, accentuated it. The signs worn by Machinists' pickets at the docks, which merely recited that the union was on strike, did not earmark American Iron as the target of the activity (p. 4, *supra*).[46] And on several occasions (pp. 4–5, *supra*) Machinists' representatives expressly requested carrier employees to refuse to handle American Iron freight.[47] Indeed,

[46] Even where, unlike here, the primary employees spend all or most of their working time on a common project with the employees of other employers—so that, as a practical matter, the common project is the only place at which the union may engage in primary picketing—judicially approved Board principles sanction the picketing only if it discloses clearly that the dispute is with the primary employer. See *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547, 549; *National Labor Relations Board* v. *Truck Drivers etc.*, 228 F. 2d 791, 796 (C. A. 5); *National Labor Relations Board* v. *Chauffeurs, Teamsters, etc.*, 212 F. 2d 216, 218 (C. A. 7); *National Labor Relations Board* v. *Local Union No. 55 etc.*, 218 F. 2d 226, 231 (C. A. 10).

The failure of the picket signs to disclose that the dispute was solely with American Iron, the primary employer, is not cured by the fact that the picketing took place only while the American Iron truck was on the dock, and the truck itself bore the name of American Iron. For, at best, the situation was ambiguous, the truck conveying to the secondary employee the notion that the dispute was limited to American Iron and the signs conveying the notion that the dispute was broader.

[47] That each request may have been made to only one employee at a time does not negate the concerted nature of the action sought. Since "the appeals were to the employees as

Business Representative Foster frankly acknowledged that the picketing at the docks was conducted with the hope that the carriers' employees would refuse to handle American Iron freight (R. 124–125).[48]

In these circumstances, the Board was fully justified in concluding that the Machinists, by picketing at the carriers' docks, were aiming at the carriers and their employees directly, and not merely engaging in primary picketing directed against American Iron.

C. THE BOARD PROCEEDING WAS NOT RENDERED MOOT BY SETTLEMENT OF THE UNDERLYING DISPUTE

The Machinists' strike against American Iron started on September 15, 1954, and the charges initiating the Board proceeding were filed on September 23 and 24 (R. 2, 11). On October 21, two days before a complaint issued on the charges (R. 8, 15), Machinists and American Iron entered into a new contract, whereupon the strike and the attendant picketing ended (R. 31). Machinists contend that these developments rendered the Board proceeding moot

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members of a group, encouraged parallel action, and were not incidental to primary picketing," it "would be artificial to say that the Union did not encourage a unity of effort, and therefore concerted action, on the part of the employees." *Amalgamated Meat Cutters* v. *National Labor Relations Board*, 237 F. 2d 20, 24 (C. A. D. C.), certiorari denied, 352 U. S. 1015. See, also, *National Labor Relations Board* v. *Local 11, United Brotherhood of Carpenters*, 242 F. 2d 932, 935 (C. A. 6).

[48] Furthermore, it is significant that no attempt was made to picket American Iron trucks delivering freight to J. H. Rose, a non-union freight carrier. It seems clear that the Machinists refrained from picketing at Rose because they knew that, unlike in the case of the unionized carriers, they would not receive the support of Rose's employees. (See R. 119, 150.)

and that it should have been dismissed. The Board and the court below properly rejected this contention (R. 31, 200–201).

Under settled principles, the voluntary cessation of unfair labor practices does not deprive the Board of power to bar a recurrence of those practices by adding the sanction of a Board order. *National Labor Relations Board* v. *Mexia Textile Mills, Inc.*, 339 U. S. 563, 567–568; *National Labor Relations Board* v. *Pool Manufacturing Co.*, 339 U. S. 577, 581–582; *National Labor Relations Board* v. *Crompton-Highland Mills, Inc.*, 337 U. S. 217, 225; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 271; H. Rep. No. 1371, 74th Cong., 1st Sess., p. 5. The fact that the settlement here may have occurred before the complaint issued does not require a different conclusion, for the stage of the Board proceeding has no bearing on the issue whether it is in the public interest to bar a resumption of unfair labor practices which may reasonably be anticipated, the only question relevant to the propriety of the Board's order. It is not unreasonable to anticipate that, under like circumstances, the Machinists, absent a Board order, may engage in the future in similar secondary activity. Nor can it be assumed that a recurrence of the Machinists' unlawful conduct is unlikely merely because its new contract contains a no-strike clause. Even if such a clause were still in effect,[*] the possibility that it might be disregarded

[*] The contract became effective on September 15, 1954, for a two-year period, subject to automatic renewal thereafter unless renegotiated or terminated on appropriate notice (R. 189–190). The record does not disclose the present status of the contract.

cannot be overlooked. And since the clause contains several exceptions (R. 188), it is apparent that the contract has not eliminated the danger of another strike by the Machinists, accompanied by illegal secondary conduct like that involved here. Cf. *National Labor Relations Board* v. *Oertel Brewing Co.*, 197 F. 2d 59, 62 (C. A. 6).

CONCLUSION

For the reasons stated, the judgment of the court below in No. 273 should be reversed and the cause remanded with directions to enforce the Board's order, and the judgment in No. 324 should be affirmed.

Respectfully submitted,

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DECEMBER 1957.

APPENDIX A

The relevant provisions of the Labor-Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C. 141, *et seq.*), which include the National Labor Relations Act, as amended, are as follows:

SHORT TITLE AND DECLARATION OF POLICY

SECTION 1. (a) This Act may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

TITLE I—AMENDMENT OF NATIONAL LABOR RELATIONS ACT

SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

"FINDINGS AND POLICIES

"SECTION 1.

* * * * * * *

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

* * * * * * *

"UNFAIR LABOR PRACTICES

"SEC. 8. (a) It shall be an unfair labor practice for an employer—* * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is

the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; * * *: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * * *

(b) It shall be an unfair labor practice for a labor organization or it agents—

* * * * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to rec-

ognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: *Provided,* That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: * * *

TITLE III

SUITS BY AND AGAINST LABOR ORGANIZATIONS

* * * * *

BOYCOTTS AND OTHER UNLAWFUL COMBINATIONS

SEC. 303. (a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(4) forcing or requiring any employer to assign particular work to employees in a par-

ticular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act.

(b) Whoever shall be injured in his business or property by reason or any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

* * * * *

TITLE V

DEFINITIONS

SEC. 501. When used in this Act—

* * * * *

(2) The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees.

* * * * *

APPENDIX B

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 10-CC-141.

TRUCK DRIVERS AND HELPERS LOCAL UNION NO. 728, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO AND GENUINE PARTS COMPANY

DECISION AND ORDER

On August 9, 1956, Trial Examiner Lloyd Buchanan issued his Intermediate Report in the above-entitled proceeding in which he found that the Respondent Union had not engaged in unfair labor practices within the meaning of Section 8 (b) (4) (A) of the Act.[1] He recommended, accordingly, that the complaint be dismissed. Thereafter, the General Counsel filed exceptions to the Intermediate Report together with a supporting brief.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. These rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief filed by the General Counsel, and the entire record in the case. It finds merit in the General Counsel's exceptions to the Intermediate Report for reasons more fully indicated below, and hence adopts only those findings and conclusions of the Trial Examiner as to which no exception has been taken.

[1] A copy of the Intermediate Report is attached to this Decision and Order.

1. *The Frame of Reference in Which the Case was Instituted and Litigated, and the Strike Activities of the Respondent Union and its Officials*

The instant proceeding was instituted to remedy a situation in which a large number of motor freight carriers operating out of Atlanta, Georgia, found themselves forced to deny the use of their transportation facilities to Rayloc,[2] a manufacturer and shipper of goods into the stream of interstate commerce. They were placed in this position, because, *inter alia*, the carriers' employees—substantially all of whom were members of the Respondent Union and covered by "hot cargo" clauses in contracts between the carriers and the Union[3]—branded as "hot cargo" the goods offered to the carriers by Rayloc, and refused, on a widespread scale extending to all the carriers, to interline or otherwise to "handle" such goods. The specific facts evidencing the timing and nature of the refusal-to-handle action, and the way such action came about, are as follows:

As a result of economic differences arising during the course of collective bargaining, the Respondent Union, as the representative of Rayloc's employees, called a strike of Rayloc's employees on March 12, 1956. On March 19, 1956, the Union established a picket line at Rayloc's operations. Prior to such strike and the events here made the subject of complaint, Rayloc had its pick-up and delivery work performed by a number of freight carriers in and around

[2] The term *Rayloc* refers to Genuine Parts Company (Rayloc Division), the Charging Employer.

[3] The clauses we refer to as "hot cargo" clauses are described in the contracts as "protection of rights" provisions. Their terms are quoted hereafter. Unless otherwise indicated, the term carriers, as used herein, has reference to carriers who were parties to the area-wide "hot cargo" contracts here involved.

Atlanta. Most of such carriers employ members of the Respondent Union under area-wide contracts containing union-shop provisions and the "hot cargo" clauses. The latter provide as follows:

> It shall not be a violation of this Agreement and it shall not be cause for discharge if any employee or employees refuse to go through the picket line of a Union or refuse to handle unfair goods. Nor shall the exercise of any rights permitted by law be a violation of this Agreement. The Union and its members, individually and collectively, reserve the right to refuse to handle goods from or to any firm or truck which is engaged or involved in any controversy with this or any other Union; and reserve the right to refuse to accept freight from, or to make pickups from or deliveries to establishments where picket lines, strikes, walkout or lockout exist.
>
> The term "unfair goods" as used in this Article includes, but is not limited to, any goods or equipment transported, interchanged, handled, or used by any carrier, whether party to this Agreement or not, at any of whose terminals or places of business there is a controversy between such carrier or its employees on the one hand, and a labor union on the other hand; and such goods or equipment shall continue to be 'unfair' while being transported, handled or used by interchanging or succeeding carriers, whether parties to this Agreement or not, until such controversy is settled.
>
> The Union agrees that, in the event the Employer becomes involved in a controversy with any other union, the Union will do all in its power to help effect a settlement.
>
> The Union shall give the Employer notice of all strikes and/or the intent of the Union to strike any Employer and/or place of business, and/or the intent of members' refusal to handle unfair goods. The Carriers will be given an

opportunity to deliver any and all freight in their physical possession at the time of receipt of notice. Any freight received by a carrier up to mid-night of the day of notification shall be considered to be in its physical possession. However, freight in the possession of a connecting Carrier shall not be considered to be in the physical possession of the delivering carrier. The insistence on part of any Employer that his employees handle unfair goods or go through a picket line after they have elected not to, and such refusal has been approved in writing by the responsible officials of the Southern States Drivers Council, shall be sufficient cause for an immediate strike of all such Employer's operation without any need to go through the grievance procedure herein."

After the picket line at Rayloc was established, the employees of the various Union-employing carriers (parties to the above contract) refused to cross the line to "pick up" Rayloc's goods. Some of the carriers then engaged independent contractors to do the pick-up work, and had the Rayloc freight brought to their (the carriers') shipping platforms for reloading on the trailer trucks for out-of-town delivery. Until March 27 or 28, 1956, the carriers, by and large, experienced only a little difficulty in having their employees load, unload, and otherwise handle the Rayloc freight at or from their (the carrier's) own premises.[5]

[4] The refusal of the carriers' employees to cross the picket line established at Rayloc's plant is not encompassed in the charges or in the allegations of the complaint. Accordingly, the portions of the above-quoted contract provisions purporting to authorize the refusals to cross the picket line are not before us for consideration, and nothing in this opinion shall be taken as passing upon the effect of such provisions.

[5] While employees of the carriers did handle the Rayloc freight in this March 19–27 period, it appears that some at least were "confused" as to whether or not they should do so.

On March 27, 1956, a special Union meeting was held to discuss the question of handling Rayloc freight and the rights of the members with respect to the matter. The details as to the call and conduct of the meeting and the action taken are set forth below.

On March 28, 1956, Union officials sent the following notice to each of the freight carriers who were parties to the area-wide "hot cargo" contract:

> *To all operators:*
>
> DEAR SIR: As you may know, Teamsters' Local 728 is on strike and engaged in picketing Genuine Parts Company's Atlanta area offices and plants, including the Rayloc plant.
>
> In pursuance of their rights under Article IX of the Southeastern Area Over-the-Road Motor Freight Agreement and Article XI of the Local Freight Forwarding Pickup and Delivery Agreement, the members have each made an individual voluntary decision to refuse to handle goods or equipment consigned to or received from this Company. This election has been approved in writing by the responsible officials of the Southern States Drivers' Council.
>
> Under the provisions of the above-mentioned Articles, the Union has the obligation to give you notice of the intent of the members to refuse to handle these unfair goods, and the members have requested that we give you this notice. This letter will serve as such notice.

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since they regarded the Rayloc freight as "hot cargo." Thus, as one employer testified, his employees would sometimes refuse for an hour, or for a day, to handle Rayloc freight, and then would do so when he urged them.

There is also evidence that a number of employees called the Union offices to find out what they should do, and that Union business agents told them at the time that they (the Union agents) would not advise them either way—that they (the members) would have to make up their own minds.

On and after March 28, employees of most of the carriers receiving this notice uniformly refused to handle or to interline Rayloc goods.[6] When asked to handle, each employee almost invariably used the stock reply: "I personally refuse to handle."

No employer discharged any employee for so refusing to handle Rayloc freight. However, there is evidence that some employers attempted, in various ways, to urge their employees to handle the freight; that at least one employer threatened discharge; and that others sought to explore what the employees would do if *supervisory* personnel attempted to service Rayloc goods. In the instances where the employers thus sought to resist their employees' refusals-to-handle, there is evidence that Union officials (conceded to be Union agents) contacted the Employers involved and warned them, in effect, that if they insisted upon their employees' handling Rayloc goods, the Union *could,* under the terms of the contract, and probably *would,* call a total strike against such employers. Certain of these episodes are more fully related below.

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[6] Specific evidence (detailed in part, *infra*) was submitted as to refusal-to-handle episodes involving three freight carriers. In addition, non-specific evidence, indicating that other carriers were affected, was provided by the parties' stipulation that the Union had a "number of witnesses" (230 in all) who, if called, would testify that each was a Union member employed by a carrier [not identified as to name] who was party to the contract, that each such member had refused to handle Rayloc goods on "one or more occasions" after March 27, but that each would assert, if called, that "no officer or agent of the Union had requested, demanded, or asked that they refuse to handle Rayloc goods."

According to Mathis, the Union's secretary-treasurer and business agent, Mathis was advised of "some instances" in which members *did* handle Rayloc goods after March 27. He could not recall what employers were involved in these instances.

Charges were filed by Rayloc on April 5, 1956, complaining of the refusal-to-handle activity by the freight carriers' employees as Union-induced and Union-sponsored secondary boycott action contravening the provisions of Section 8 (b) (4) (A) of the Act. On May 7, 1956, the General Counsel issued a formal complaint in behalf of the Board to obtain a remedy for this activity. In answering the complaint the Union denied that it had taken any measures violative of Section 8 (b) (4) (A) of the Act. It described its activities as including the call of a "special meeting" on March 27, 1956, at which the members individually and unanimously decided not to handle freight destined to or from Rayloc; and its "sole" act in connection with said meeting as the giving of "advice to its members (who were employees of the various motor carriers) of their rights under the [hot cargo] contracts and of the fact that the Union had to notify the companies of the employees' intent, if they so desired, not handle the freight * * *." It further contended, in its answer, that when the employees refused to handle Rayloc freight each was effectuating "an individual choice and decision" and that each employee had a "right" so to do under the "hot cargo" contracts, and that the Union had a "right" to "cause" the members to exercise their contractual privileges.

Litigation of the complaint and answer developed the occurrences of the Union meeting of March 27 in some detail. It appears that Weldon Mathis, the Union official who presided, made known that the object of the meeting was to consider the advisability of the members' support of the Rayloc strike through "hot cargo" action against Rayloc goods being offered to the carriers for transportation. Discussion of the matter, led by Mathis, and participated in by the members present, proceeded on the premise that the

taking of such "hot cargo" action was a desirable means of supporting their fellow members' strike at Rayloc. The only real question which was debated was how to translate the desire into reality in the face of a statutory prohibition against Union-sponsored secondary boycott action, on the one hand, and the possible exercise of the discharge power by carriers against employees who engaged in such boycotting activity on the other. In the course of the discussion, Mathis called the attention of the members to the "protection of rights" clauses in the contracts. He advised them that such contracts offered them a "right" to elect, as "individuals" not to handle Rayloc freight, although the Union could not "instruct" or "require" them to make such an election. He told them further, that under such contracts, the Union had a right as an entity, to call a full-fledged strike to protect a nonhandling "election" by its members, against any discharge action the employers might take; that the Union officials (in whom the administration of Union financial and other affairs was vested) were prepared to, and would, authorize such a strike to protect the members' nonhandling "election"; and that, while a motion approving, in formal terms, a membership pledge not to handle Rayloc goods was unacceptable because it might subject the Union to liability under this Act, a resolution declaring the intent of the members—as individuals—not to handle, could safely be adopted. Mathis then read to the members a resolution he had previously prepared with the advice of counsel, and the membership unanimously adopted it.[7] Thereafter, the members

[7] The Resolution read in full as follows: Local 728 is on strike and engaged in picketing Genuine Parts Company's Atlanta Area Offices and Plants, including the Rayloc plant. Under Article IX of the Southeastern Area Over-the-Road

and their agents—the Union officials—promptly invoked the "rights" which were the subject of the resolution and the discussion, and thus brought about the virtual cessation of business dealings between many, if not all, of the carriers and Rayloc.[8]

In weighing the Union's actions, as above-described, the Trial Examiner deemed himself precluded by the failure of the General Counsel to "attack" the "hot cargo" contracts affirmatively in the complaint, from interpreting any action taken by the Union not inconsistent with the privileges contractually reserved

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Motor Freight Agreement and Article XI of the Local Freight Forwarding Pickup and Delivery Agreement, each member has the right to make an individual voluntary decision as to whether he will or will not handle goods or equipment consigned to or received from this Company.

In accordance with this right each of the members has made and now announce [sic] his individual voluntary decision not to hand [sic] such goods. Under the same Articles mentioned above, it is the obligation of the Union to give each employer notice of the intent of the members to refuse to handle these unfair goods and in order to comply with the obligations of these Articles, the officials of the Union are hereby requested to notify each carrier employer of the intent of these members to refuse to handle these described unfair goods.

[8] Certain additional evidence was also developed as to the activities of various Union stewards at certain of the freight-carriers' premises. In broadly descriptive terms, it establishes that certain Union stewards advised carriers' representatives (their Employers) that the Union had given the members orders or instructions not to handle Rayloc Freight; and that such stewards had otherwise directly induced their fellow members of employees of the carriers not to handle Rayloc freight.

Because the probative value of this evidence turns on a preliminary disposition of the Union's contentions that it is not responsible for the statements or the conduct of job stewards, we shall defer discussion on this phase of the case in the interest of first testing the issues on the basis of the acts of the admitted agents of the Union and its members.

to it and to its members as constituting evidence supporting the complaint.[8] While implicitly conceding that the action of the Union and its members had inspired and had produced a secondary boycott of Rayloc goods by the freight carriers, the Trial Examiner found himself unable to interdict the boycott action so long as there was no "preponderating evidence" that the Union had either directly commanded its members to refuse to handle Rayloc goods or otherwise surrounded any appeals to them for such refusal with any direct or indirect threat of intra-union disciplinary action. He therefore concluded that the refusal-to-handle action could be viewed as action resulting from determinations made by the "individual" workmen free of the compulsion of official Union orders or instructions, and that in such circumstances, the General Counsel had not met his "burden" of proving violations of 8 (b) (4) (A) of the Act. The grounds of our disagreement with these findings and conclusions of the Trial Examiner are indicated below.

2. *Analysis and Discussion*

It is clear from the foregoing facts that, in refusing to handle Rayloc goods and/or otherwise impeding the carriers' handling and transportation of such goods, the employees of the carriers sought to, and in many instances did, force such carriers to boycott Rayloc or to cease doing business with it. That the affected employers were thus placed in an economic position having consequences the Congress deemed injurious to the public interest (as evidenced

[8] The General Counsel confined himself to stating only that the "hot cargo" contracts "and any action they required were not available as a defense" to the complaint.

by the "object" sections of 8 (b) (4)) is not seriously questioned here—nor, we think, can it be. The precise questions framed by the pleadings and the contentions of the parties as they affect the complaint are: (1) does the record establish that such employee activity was "concerted" activity—the product of Union agreement, or the encouragement or inducements of Union agents; and (2) if so, does the existence of the "hot cargo" contracts to which the Union and the carriers were parties operate as a bar to the complaint, and/or otherwise affect the grant of any remedy under it.

Before undertaking the task of answering these questions, we deem it necessary, in light of the Trial Examiner's failure to recognize the difference in the nature of these two issues, and certain observations of our dissenting colleague, to make some preliminary comments upon the separable considerations underlying the stated issues.

Allegations that a union has engaged in, or has induced or encouraged employees to engage in, concerted refusal-to-handle activity, present pure questions of fact. They are susceptible of resolution upon considerations entirely different than those involved in a determination of the merits of union attempts to resort to the provisions of "hot cargo" contracts and the action they require or privilege, as a defense to a complained of violation of Section 8 (b) (4). Thus, the factual allegations must necessarily be resolved wholly on the basis of the record evidence produced in a particular case. Only when they are found to be predicated upon substantial evidence, is the Board squarely faced with the problems posed by the interposition of "hot cargo" contracts as a defense. These latter problems present, essentially, important questions of law calling for the

Board's exercise of the function of statutory interpretation—an area in which the arguments of parties may aid, but cannot limit, the Board's choice of the sources to which it may properly refer in making its determination.

These distinctions between the nature of the two issues as described above have been recognized by the Board even in cases where a majority—in opinions subscribed to by our dissenting colleague—has dismissed complaints it has found factually predicated on union-induced refusal-to-handle activity because of independent determinations that where "hot cargo" contracts existed, the Statute did not authorize the Board to interdict the activity.[10] We are surprised,

[10] *The Pittsburgh Plate Glass* case, 105 NLRB 741, is a notable example of a decisional situation closely analogous to that presented here. There, as here, the complaint allegations that the union had engaged in, and had induced and encouraged employees to engage in, refusal-to-handle activity were predicated largely upon evidence that, in the context of a "hot cargo" contract, Union agents had: (a) "advised" or had otherwise informed members at union meetings and on the job that they (the members) had a "right" as "individuals" to follow their own feelings with respect to the handling of "hot cargo"; and (b) stated to management representatives seeking to resist this conduct that the members' action was consistent with the provisions of the "hot cargo" clauses and represented the members' action, therefore, as an exercise of "rights" the members were entitled to enjoy.

While the Board as then constituted (including Member Murdock) ultimately dismissed the complaint on grounds that the existence of the "hot cargo" contracts operated, as a matter of law, as a defense to the complaint, the Board went out of its way to find that the Union had *in fact* "engaged in and by its instructions and other means, induced and encouraged" the employees of the secondary carrier-employers, to engage in, "a concerted refusal to handle" the freight of a struck-bound shipper. It is interesting to note, that in making these find-

therefore, at our dissenting colleague's suggestion, in this case, that we deny the parties the requirements of "due process" in undertaking to dispose of the issues along the lines indicated.

Having thus made these preliminary observations as to what, in our view, constitutes an appropriate administration of the judicial process in cases such as these, we turn next to a determination of the factual allegations of the complaint.

We are satisfied, upon the facts set forth above, that the refusal-to-handle or "hot cargo" activity of the carriers' employees was an integral part of a program formulated and effectuated by the Respondent Union *as a labor organization,* inspired and sponsored by the *Union officials*—its admitted agents—and directed, as has been noted, at *unlawful objectives.* Thus, we have before us proof that widespread "hot cargo" action followed a Union meeting; that such meeting was called and conducted for the purpose of considering the taking by those members employed by the carriers, of "hot cargo" action; and that such meeting produced an agreement (in the form of a resolution) by the members present, to refrain from handling Rayloc goods. In these circumstances, no straining is required to reach the conclusion that the "hot cargo" action was *concerted* Union action—the means by which a collectively-formulated policy was given effect.[11] We also have before us proof that the

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ings, the Board had before it the contrary determinations on this very issue of fact, of: (a) the District Court passing upon the issues at an injunction phase; and (b) the Trial Examiner passing upon the issues in the record presented to the Board.

[11] Compare *Roane-Anderson Co.*, 82 NLRB 696, 704-705, where the Board (our dissenting colleague agreeing) sustained a Trial Examiner's finding that a "work stoppage in the nature of a strike" was involved when over 100 employees—

Union's officials participated actively in the formulation of this "hot cargo" program by creating the occasion for the members to meet to consider its adoption; by promulgating and sponsoring its adoption; and by pledging the combined economic power and resources of the Union as a means of protecting its members' actual participation in effectuation of the "hot cargo" program against any retaliatory measures the carriers-employers of such members might take. And, finally, we have proof that the Union's officials actually provided the support and "protection" they had thus promised to the members, in each instance in which carriers sought to resist their employees' "hot cargo" actions, by threatening such carriers with a full-scale strike of their operations if they continued their resistance efforts.[12]

We find no substance in the Union's suggestion that the "hot cargo" program involved, basically, the recognition of the right of each individual member to refuse to do work under conditions which did not suit him. The right of an individual to work or not to work as he pleases cannot, of course, be questioned. While we have doubt that exercise of such right also

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members of a union—each individually resigned or quit their jobs on a particular date for allegedly "personal" reasons. The Trial Examiner specifically found "incredible" the contention of the Union and the testimony of employees offered to support it, that such quittings were not the product of "common agreement or direction" but rather the "result of as many different individual decisions arrived at independently, yet fortuitously at the same time."

[12] There is ample precedent for regarding the statements made by union agents to management representatives as probative evidence on the issue of union participation in the members' refusal-to-handle activity. See, e. g., *Pittsburgh Plate Glass Co.*, 105 NLRB 740, 743 at note 3; *Reilly Cartage Co.*, 110 NLRB 1742, 1765, at note 22.

permits an employee to assert a right to elect *not* to perform certain work tasks his employer may properly assign him and yet to continue the employment relationship—this is a question we need not here decide. For, as has already been observed, what is here involved is not an assertion of *individual* right by individuals, but rather the formulation and enforcement by the *Respondent Union—as a labor organization*—and the sponsorship of, and participation in such program by its individual officials, of a collective policy or program aimed at forcing the carriers to deny their transportation facilities to Rayloc.[13]

We can not regard as dispositive here the fact that, in sponsoring the members' adoption of the "hot cargo" program here in issue, the Union imposed no threat of either direct or indirect disciplinary action on its members as a means of obtaining their agreement. This is so because, under the meaning of the words "induce and encourage" in Section 8 (b) (4) (A) which the Supreme Court sanctioned,[14] a union's

[13] Compare, by analogy, *International Typographical Union et al.*, 86 NLRB 951, 953, where the Board (our dissenting colleague agreeing) rejected union contentions that individual rather than union pressure was being exerted on employers under the "condition of employment" strategy. The Board there said, at p. 953, note 4, that the "announcement by a union to employers that its membership would not work under certain conditions, coupled with a union's careful maneuvering of negotiations so as to permit a ready and coincidental exercise of the right not to work having union sanction constitutes a union [sponsored] threat to strike for the specified conditions." The Union's announcement to its membership here and its promulgation of the "right" of individual members to refuse to handle seem analogously related.

[14] *International Brotherhood of Electrical Workers* v. *N. L. R. B.*, 341 U. S. 894.

conduct can come within the reach of the Statute where the union sponsors, authorizes or otherwise encourages, the unlawful activity, even though it may not *compel* or *require* its members to engage in it. The pertinent language of the Supreme Court is as follows:[15]

> * * * The words "induce and encourage" are broad enough to include in them every form of influence and persuasion. There is no legislative history to justify an interpretation that Congress by those terms has limited its proscription of secondary boycotting to cases where the means of inducement or encouragement amount to a "threat of reprisal or force or promise of benefit." Such an interpretation would give more significance to the means used than to the end sought. If such were the case there would have been little need for § 8 (b) (4) defining the proscribed objectives because the use of "restraint and coercion" for any purpose was prohibited in this whole field by § 8 (b) (1) (A) * * *.
>
> b, The intended breadth of the words "induce or encourage" in § 8 (b) (4) (A) is emphasized by their contrast with the restricted phrases used in other parts of § 8 (b). For example, the unfair labor practice described in § 8 (b) (1) is one "to restrain or coerce" employees; in § 8 (b) (2) it is to "cause or attempt to cause an employer"; and in § 8 (b) (6) it is to "cause or attempt to cause an employer." The scope of "induce" and especially of "encourage" goes beyond each of them.

We view as irrelevant to a determination of the issues here posed, the asserted "good faith" intent of the Union or its agents to engage in no conduct which the law—as it understood it—squarely pro-

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[15] The quoted portion of the case just cited appears at 341 U. S. 901–902.

hibited. Our examination of the Union's action cannot be controlled by the Union's understanding of the law. For, in the words of the Supreme Court, "the law is its own measure of right and wrong and of what it permits or forbids." *Standard Sanitary Manufacturing Co.* v. *U. S.*, 226 U. S. 20, 49. Further, that the persuasion and influence found to exist may have been but an incident of a "good faith" attempt by Union officials to perform an intra-union duty to "advise" the members, and that it occurred within the confines of a Union meeting, calls for no difference in evaluation of the officials' conduct. The Statute grants no exemptions to unlawful conduct because committed in the confines of a Union meeting or because it occurred as an incident to, or in explanation of, Union regulations or policies.[16]

We conclude, upon the basis of the foregoing, that the Union engaged in, and that its agents induced and encouraged the employees of the carriers to engage in, a concerted refusal to handle Rayloc freight, thus causing the carriers to cease doing business with Rayloc.

We turn now to the problems posed by the existence of the "hot cargo" contract provisions. As noted above, the precise question presented to us by the pleadings in this case is whether such contracts operate as a bar to the grant of any remedy under Section 8 (b) (4) of the Act where we are satisfied upon the record before us, that a secondary boycott was produced by the Union's participation in and its instigation of a concerted refusal by the carriers' employees to handle Rayloc goods. The parties have set forth their position on this issue as follows: Apparently

[16] See, e. g., *Reilly Cartage Co.*, 110 NLRB 1742. Cf. *Joliet Contractors Assn. et al.*, 99 NLRB 1391, enf'd. 202 F. 2d. 606, 611-612 (C. A. 7).

relying upon presently prevailing Board theory, as explicated in the *Sand Door* and *American Iron* cases,[17] the General Counsel did not frame the complaint in terms attacking the contracts as either unlawful or invalid. He claimed only that such contracts, and any action they required were not available as a defense to the kind of refusal-to-handle action described in the complaint, and here found to have been taken. The Union argued, however, that its "hot cargo" contracts must be given operative effect as a defense, so far as its conduct was consistent with the provisions of such contracts, because the contracts are lawful and valid. It rested this argument on what is now familiarly referred to as the *Conway's Express* rule,[18] and on the failure of the General Counsel to "attack" the contracts affirmatively.

In recent years, a Board majority has agreed that "hot cargo" contracts do not remove conduct otherwise unlawful from the reach of 8 (b) (4) (A). But, the opinions subscribed to by such majority have adopted a theory which does not turn on the validity of the "hot cargo" contracts, and assumes that it "is not within the province of the Board" to hold that

[17] *Sand Door and Plywood Co.*, 113 NLRB 1210; *American Iron and Machine Works, Inc.*, 115 NLRB 800.

[18] This rule—followed by our dissenting colleague here and in all cases involving "hot cargo" contracts—affirmatively sanctions the validity of "hot cargo" contracts and gives them operative effect as a defense to the kind of refusal-to-handle activity here involved. It was first enunciated in *Rabouin, d/b/a Conway's Express Co.*, 87 NLRB 972, enforced 195 F. 2d. 206 (C. A. 2) and was followed by the Board until 1954 when the *McAllister Transfer Co., Inc.*, case, 110 NLRB 1769, issued. In the latter case, a majority of the Board held that "hot cargo" contracts cannot operate as a shield to concerted refusal-to-handle actions engaged in by a union, or induced by overt acts of its agents.

such contracts are invalid.[19] The General Counsel's failure to attack the legal validity of the "hot cargo" contracts, and his argument that they did not constitute a defense to the refusal-to-handle activity as here evidenced, follows this theory. However, we are convinced that this is not a case which should be disposed of solely on that narrow theory—as stated in the *Sand Door* case—and that, indeed, we may[20] and should here rule that "hot cargo" contracts between unions and common carriers are invalid and hence cannot be recognized by this Board as having any force and effect so far as the administration of this Act is concerned.[21]

In making this determination, we need not definitively decide that the Union's position that its "hot cargo" contracts constitute a defense to the complaint cannot be disposed of on the narrow theory set forth in the *Sand Door* and the *American Iron and Machine*

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[19] See *Sand Door & Plywood Co.*, 113 NLRB at p. 1215.

[20] In light of the Union's contentions, the members comprising the majority agree that the validity of the "hot cargo" contracts is presented as a basic issue in this case. However, as hereafter indicated, there is some difference of opinion between the members comprising the majority as to whether this basic issue should be decided here.

[21] Although, because of the state of the pleadings, we shall refrain from issuing any order affecting the existing contracts, we may nonetheless utilize this case as an appropriate vehicle for comment on an "evil under the Act which [the Board] sees confronting or lurking in [the] situation before it." *N. L. R. B.* v. *International Brotherhood of Teamsters, etc.*, 225 F. 2d 343, 347 (C. A. 8). As the Court indicated in the cited case in an analogous situation, our ruling at this time should be read as a warning that any attempt to enforce a contract provision like that here involved, after our pronouncement of its invalidity, can afford the basis of unfair labor practice charges. *Ibid.*, at p. 348.

Works cases.[22] But there is room for questioning its adequacy in the factual circumstances of this case, and we find ample basis here for rejecting certain postulations which the Board regarded as unanswerable in the *Sand Door* case and which apparently impelled its holding that, in effect, it was preempted from declaring "hot cargo" contracts invalid or against public policy. We refer particularly to the postulations involved in the Board's reasoning that employers are not required by law to sell their services or goods, as the case may be, to any customer who seeks to purchase them, that "hot cargo" clauses evidence the employer's "voluntary" agreement to refrain, in effect, from doing business when at some future time the union party to such contract requests that he do so, and that, accordingly, the Board is without legal power to view these contracts as a nullity.

Our ten years of experience with the cases involving "hot cargo" clauses, our cumulative examination of the positions taken by the contracting employers in such cases, and the economic realities involved, should leave us with considerable doubt that employers acquiesce to such provisions "voluntarily"—in the pure sense of this term—especially in a heavily organized industry like the motor transportation industry. In any event, if a union cannot, in fact, obtain a valid contract permitting it to take "hot cargo" action, it matters not that the employer's consent to such a contract is given "voluntarily."

The other, and major reason for Board refusal in the cases since *Sand Door* to hold "hot cargo" contracts invalid, postulates, as noted, that if employers may, at will, refrain from doing business with any individual, they may validly agree to refrain from doing

[22] Citations given *supra*, note 16.

business in anticipation of union requests to that end. However, we are convinced that, where the contracting employers are common carriers, the existence of the Interstate Commerce Act,[23] destroys this rationale. For under the express provisions of the ICA, common carriers like those before us here, are not free to decide, at will, to withhold the services they hold themselves out as able to perform, from any customer or class of customers. They are, rather, under a duty to make their facilities available without discrimination or undue preference to *all* customers willing to meet the conditions of their published tariffs and schedules within the physical limits of their facilities.[24]

It is true, as our dissenting colleague points out, that carriers who have been coercively compelled by unions to refuse to service strike-bound plants have succeeded, in some cases, in persuading the ICC not to impose the sanctions of the Act against them for their inability, after making reasonable efforts, to give the complaining shippers service. In each of these cases, performance of the service requested

[23] 49 U. S. C. A., Part II, Sec. 301 et seq. This Act is hereinafter referred to as the ICA. Where the Interstate Commerce Commission is referred to herein, it is identified as the ICC.

[24] See Section 316 of the ICA, and particularly, Section 316 (d) which provides, in part, as follows: It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: Provided, however, that this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

would have required the carriers' employees to go through the picket lines at the struck-bound plant in circumstances imposing serious threats to the safety of the carriers' employees and to its equipment.[25] But we know of no case in which the ICC has held that carriers are free, under the law, to acquiesce, voluntarily, in union requests that goods the union unilaterally brands as "hot" or "unfair" shall, for that reason, be subjected to boycott. Indeed, in the only ICC case we know of in which a carrier refused to service a shipper in circumstances where the shipper did not ask for services which would have required the carriers' employees to go through any *primary* picket-line of a striking union, the ICC would not excuse the carriers' refusal.[26] It is interesting to note

[25] See e. g., *Montgomery Ward & Co.* v. *Consolidated Freightways*, 42 MCC 225. But see *Montgomery Ward Co.* v. *Northern Pacific Terminal Co.*, 128 F. 2d. Supp. 485, in which the U. S. District Court held the common carriers liable to the shipper for refusing freight it had tendered to the carriers even though such refusal was grounded on the fact that the Union (with whom the carrier had a "picket line" contract) threatened to strike the carriers if it carried the goods in question. The Court said: "A contract with a union representing its employees cannot relieve a carrier from performing its duties, even when threatened with a strike."

[26] *Planters Nut & Chocolate Co.* v. *American Transfer Co.*, 31 MCC 719. Cf. *Montgomery Ward, Inc.* v. *Sante Fe Trail Transportation Co.*, 42 MCC 212. The latter case is one in which the ICC would not excuse a carrier's denial of service to a shipper even though such denial was based upon a refusal on the part of the employees of certain motor carriers to cross an established picket line around a complainant's (shippers) establishment. The ICC considered the legitimacy of the picket line, and found that "the picket line does not appear to have been that of a striking union." It further found that it had not been shown that defendant carriers had exercised reasonable diligence to overcome the obstacles imposed, or that they had

that, in so doing, the ICC specifically denied validity to carriers' arguments that they, as corporations, could not be held to have refused their services to the shipper, because it was their *employees'* refusal to handle the goods their union had branded as "unfair" which was the proximate cause of the resulting boycott.

In any event, it is not our intent, in making reference to the provisions of the ICA to judge the actions of the common carriers subject to the ICA. Our purpose is narrowly limited and can be summarized as follows: We have been commissioned by the Supreme Court not to ignore the other and equally important

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made a reasonable attempt to serve the complainant and were physically prevented from so doing.

It is interesting to note that, in a recent case coming before the ICC an Examiner ruled that motor freight carriers who boycotted goods of a shipper branded as unfair by a union (beneficiary of a "hot cargo" contract signed by the carrier) violated the provisions of the Interstate Commerce Act. *Galveston Truck Line Corp.* v. *Ada Motor Lines, Inc., et al.*, Case No. MCC-1922 on the ICC dockets. Compare, by analogy, *U. S.* v. *Balt. & O. R. R. Co.*, 333 U. S. 169, where the Court held that a railroad had violated the ICA by refusing to carry certain goods of a shipper because the provisions of a lease contract between the railroad and the owner of the track forbade the railroad from carrying the kind of goods the shipper sought to ship. The Court there said: (at p. 175) The ICA is aimed at wiping out discriminations of all types and language of the broadest scope has been used to accomplish the purposes of the Act * * *. This Court has long recognized that the purpose of Congress to prevent certain types of discriminations and prejudicial practices could not be frustrated by contracts * * *. Cf. *Nebraska Short Line Carriers, Inc.*, Case No. MC-116067 (Sub-No. 2) D. L. R. 8-9-57 (Recommended Order of Examiner of ICC).

statutory schemes in administering our statute.[27] The carriers before us are subject to the ICA—a scheme designed, like ours, to facilitate the flow of commerce. It has been argued that a Board holding that the "hot cargo" contracts are invalid may impose a qualification upon an employer's right to choose his customers.[28] We have looked to the provisions of the ICA to determine whether such argument is here available. Because the ICA in itself restricts and qualifies the common carriers' freedom of choice in the respects noted, we find that the argument as above-stated is destroyed, and that, accordingly, the rationale of those Board cases which sustain the validity of "hot cargo" contracts is wholly inapplicable where the Employer parties are common carriers subject to the provisions of the ICA. Whether or not such rationale may still be effectively employed in cases involving other types of employers is a question we need not here decide.

We are satisfied, on the basis of the legislative history of the Act as it throws light on the objectives of the Congressional scheme embodied in Section 8 (b)

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[27] See *Southern S. S. Co. v. N. L. R. B.*, 316 U. S. 31, 47, where the Supreme Court stated: "The Board has not been commissioned to effectuate the policies of the NLRA so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodations of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task."

[28] The right to condition such choice, by contract, would be an incident of the larger right to make the choice.

(4) of the Act,[29] that the "hot cargo" contracts here involved are repugnant to the basic policies of the Act and in conflict with the public rights this Board is under a duty to protect. We therefore hold that, at least where common carriers for hire are involved, the kind of "hot cargo" clauses here before us are invalid at their inception and can be given no operative cognizance so far as the administration of this Act is concerned.[30]

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[29] See the various opinions signed by our colleague, Member Rodgers, (including his concurrence in the instant case) which ably review and refer to the pertinent legislative history of the Act and of the legislative debate which preceded its enactment. See particularly the *McAllister Transfer Co.*, opinion, 110 NLRB 1769, 1778–1783. Such references support the view that, in enacting Section 8 (b) (4) (A), Congress not only intended to outlaw *all* union-sponsored secondary boycotts instituted under "hot cargo" and "struck work" contracts, but evidenced an intent to nullify and to invalidate such contracts. In the latter connection, see particularly the reference at 110 NLRB p. 1781 and note 20. See also, the dissenting opinion of Member Reynolds in *Rabouin, d/b/a Conway's Express*, 87 NLRB 972, at pp. 995–996 for a general discussion of the legislative intent.

[30] It is the view of Chairman Leedom and Member Jenkins that the manner in which the Union here employed its invalid "hot cargo" contracts in producing a secondary boycott aptly demonstrates the need for an affirmative decisional rule which will serve notice upon unions that their act of integrating into a collective bargaining contract provisions which authorize and encourage employees to refuse to handle freight or goods described therein as "hot" or "unfair" constitutes *prima facie* evidence of union inducement or encouragement of the kind of activity interdicted by Section 8 (b) (4). The pragmatic approach that has heretofore been utilized by the Board in dealing with "hot cargo" contracts does not discourage unions from demanding such contracts at the bargaining table. It is for this reason that we would propose a rule, wherever (as is here the case) we would find "hot cargo" contracts to be invalid, clearly notifying unions and their members that they cannot, as a matter of law, enjoy, exercise, or assert any of the "hot

In stating these views, we are not unmindful of those arguments opposing them which are predicated upon a restrictive interpretation of the words "in the course of employment" as used in the introductory phrases of Section 8 (b) (4). Nor are we unmindful of the fact that the Second Circuit Court of Appeals deems those arguments meritorious.[31] But, with due

cargo" privileges such contracts purport to grant and that any attempt so to do for the purposes sought to be served by such contracts exposes the unions to liability under Section 8 (b) (4). Specifically, we would declare that, in situations like those before us here, a *prima facie* case of a union violation of Section 8 (b) (4) is established whenever proof is adduced that: (1) there is in effect a collective bargaining contract which purports to authorize or encourage employees of a common motor carrier for hire to exercise a "right" not to handle a shipper's goods because such contract brands such goods as "unfair" or "hot"; and (2) such shipper is in fact refused the use of the facilities of said common motor carrier for hire. Cf. *Joliet Contractors Association* v. *N. L. R. B.*, 202 F. 2d 606, 608–609 (C. A. 7), where the Court indicated that the provisions of internal union regulations and by-laws which purported to preclude union members from working on materials supplied by nonunion or unfair firms supplied proof of inducement and encouragement of employees to strike or to engage in conduct in the nature of a strike, once an employer-employee relationship has been established.

[31] See *Milk Drivers, et al.* v. *N. L. R. B.*, 245 F. 2d 817, (C. A. 2), affirming the views originally expressed in *Rabouin, d/b/a* Conway's Express, 195 F. 2d 906 (C. A. 2), and in the Board majority in its decision of the latter case, 87 NLRB 972. *But see* the concurring opinion of Judge Lumbard in *Douds* v. *Milk Drivers and Dairy Employees Union Local 584 International Brotherhood of Teamsters, et al.*, (C. A. 2), 40 LRRM 2673, decided October 2, 1957, in which he comments: "* * * the decisions of this Court in the *Rabouin* and *Milk Drivers* [cases] seem to me to be contrary to both plain statutory language and the intent of Congress." Our dissenting colleague's opinion is predicated on the rationale of the decisions of the Second Circuit Court of Appeals cited in the first sentence above.

deference to that Court, we respectfully disagree with its interpretation of the quoted statutory phrase. For we are convinced of the correctness of the view—initially given expression by the majority opinion of the Board in *Sand Door*, and since approved by the Ninth and Sixth Circuit Courts of Appeals[32]—that the words "in the course of employment" were employed to distinguish between employee conduct or activity in the course of the employment relationship and in furtherance of the employer's business, and employee conduct in the pursuit of interests not related immediately to the requirements of the business of the employer-party to the employment relationship. In sum, we feel that the phrase "in the course of employment" was used by Congress to make clear its recognition that unions traditionally induce employees, in their capacity as consumers, to refrain from purchasing or using certain products made by nonunion manufacturers or produced under sub-standard working

[32] See the *Sand Door* decision, op. cit., *supra*, note 16, at p. 1217. The Ninth Circuit Court of Appeals approved this view of the Statute. See 241 F. 2d. 247. The Sixth Circuit Court of Appeals affirmed it in enforcing the Board decision in *United Brotherhood of Carpenters & Joiners*, v. *N. L. R. B.*, 242 F. 2d 932. To the same effect see the dissenting opinion of Judge Prettyman, in *General Drivers, et al.*, v. *N. L. R. B.*, 247 F. 2d 71 (C. A. D. C.) in which he expresses approval of the Board's interpretation of the statutory language here under discussion and the grounds of his disagreement with his colleague's rejection of that interpretation and their adoption of the restrictive meaning given the terms by the Second Circuit Court of Appeals.

The concurring opinion of Member Rodgers quotes pertinent passages from the opinions of the Sixth Circuit Court of Appeals and the dissent of Judge Prettyman from the decision of the Court of Appeals for the District of Columbia. We join Mr. Rodgers in expressing our agreement with these quoted passages and the conclusions they support.

conditions, and to exempt that kind of union inducement from the operative scope of Section 8 (b) (4).[33] We are entitled so to reason because of evidence in the legislative history that, although Congress knew that union-inspired secondary boycotts frequently occurred in the context of "hot cargo" contract arrangements, it nonetheless employed no language which would exempt such boycotts from the purview of Section 8 (b) (4), but chose, rather, to interdict all union-inspired boycott action without qualification.[34] But, in addition, we may and have considered the meaning given simlar phraseology by the Courts in interpreting those statutes containing it which predated the enactment of this Act, together with the fact that nothing in the legislative history justifies imputing to the legislature any intent to use those words in any different sense in framing this Act. We refer specifically to the fact that the words "in the course of employment" appeared most frequently in statutes relating to workmen's compensation. References to standard texts explaining the meaning of these terms in workmen's compensation cases establishes that their meaning in this usual context was well understood to have reference to the *time*, *place* and *fact* of employment, and imposed employer liability for injuries sustained while employment was "in progress" and while

[33] It seems obvious to us in a situation like that here before us, the Employer's business clearly contemplates the handling by employees, at his direction, of goods of other employers. For such "handling" requirement is part of the employment relation before a boycott is instituted and will still be part of the relation after the boycott is ended: and the very argument that a "hot cargo" clause removes the "handling" duty from "the course of employment" is a recognition that the "handling" of goods was meant to be regarded as being part of the "course of employment" as offered and accepted.

[34] See *supra*, note 29 for the pertinent references.

employees were engaged in activity which, fairly viewed, was in furtherance of, and for the benefit of, the employer's business as he envisaged it.[35]

As has been indicated, our power to frame a remedy giving full substance to these views is limited by the pleadings. Nevertheless, what we have said preempts the Union from justifying either its representation of the "hot cargo" contracts to its members as affording them protected rights, or its officials' active promulgation and support of its members' "hot cargo" action, on grounds that such conduct was expressly authorized by, and was consistent with, the terms of the "hot cargo" contract clauses.

We conclude on the basis of the above rationale that the "hot cargo" contracts here involved were wholly invalid and that, as a matter of law, their provisions afforded the Respondent Union no basis for defending the charged violations of Section 8 (b) (4) (A) of the Act.

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[35] The following quotations from standard texts provide an example:

(a) "'In the course of employment' points to the time, place and circumstances under which an accident takes place, and simply means 'while the employment was in progress'." W. R. Schneider, *Workmen's Compensation Text*, Vol. 6, p. 19.

(b) "An injury is said to arise in the course of employment when it takes place within the period of the employment, at a place where the employee reasonably may be, and while he is fulfilling his duties or engaged in doing something incidental thereto." A. Larson, *The Law of Workmen's Compensation*, Vol. 1, p. 193.

See also the interpretation of the phrase "in the course of employment" in *Voehl v. Indemnity Insurance Co.*, 288 U. S. 162, where the *Longshoremen and Harbor Workers Compensation Act*, U. S. C. A., Title 3, Sections 901–950 was being interpreted. See also the construction of the same language by the Court of Appeals for the District of Columbia in *Lumberman's Mutual Casualty Co. v. Hoage*, 58 F. 2d 1072.

3. Discussion of the special issues and facts relating to the activities and statements of job stewards

The General Counsel claimed that, as to the refusal-to-handle episodes involving certain of the carriers, the statements and activities of Union job stewards at the premises of such carriers provided an additional and/or independent basis for sustaining the complained of violations.

The record evidence going to the nature of the stewards' activities and statements is set forth in the Intermediate Report. In dealing with such evidence, the Trial Examiner proceeded on the basic premise that job stewards were not "agents" of the Union and that hence, none of the conduct or the statements variously attributed to some of the stewards could properly be used as evidence of the Union's inducement or encouragement of the refusal-to-handle action.

In his exceptions, the General Counsel claims, among other things, that the Trial Examiner erroneously applied the principles established in *Southwestern Motor Transport Co.*, 115 NLRB 981. He contends that, in fact, such case constitutes precedent for findings that: (1) the Union is responsible for acts of stewards which amounted to inducement or encouragement of employees, whether or not the same were expressly authorized; and (2) statements attributed to stewards by management representatives to the effect that the Union had instructed, directed or authorized refusals-to-handle, constitute direct evidence bearing on the truth of the subject-matter of the statement, because such stewards' statements concerned a matter within the scope of their authority. We agree with both aspects of the General Counsel's substantive contentions. We also find meritorious his

reliance upon *Southwestern Motor Transport* case as supporting precedent for such contentions and ground our findings here upon that and the related decisions hereafter cited.

The record here, as in other analogous cases in which the Board has passed upon the status of union job stewards, establishes that the Union's job stewards have the customary duties and authorities of union job stewards, including the transmission of official union messages and instructions to the members.[36] While the Union's officials claimed that the authorization vested in stewards with respect to the transmission of messages to members is limited to messages which such officials give the stewards in *writing*, we do not regard such asserted limitation as having any real significance to the determination of the agency issues as here posed. What is controlling is that, so far as all the parties dealing with Union stewards are involved, the stewards were *the Union* on the job and that they were expressly vested with sufficient authority so to act, as to warrant the inference that the actions here attributed to them fell within the scope of the delegated powers. We note, among other things, that there is nothing in the by-laws or in any other integrated Union document to show any such stringent limitation on stewards' duties as those here

[36] The Union's officials who testified with respect to the duties performed by stewards on behalf of the Union described them as including dues-collections, checks of membership books, making reports on employment of nonmembers to the union, posting official Union communications and notices on the Company's bulletin boards, accepting employee grievances and functioning as the Union agent in the first step of adjustment of such grievances with management, reporting on the grievances to Union officials, and transmitting to employees the written instructions or messages the Union has sent to stewards for distribution to the membership.

claimed by the Union. We note, further, that there is no evidence that any employee-members had been specifically advised to disregard oral instructions or directions given them by stewards in the capacity of the latter as Union job-representatives; that, indeed, there is some record evidence that employee-members believed that stewards had the power to instruct them—as Union agents—as to whether or not to handle Rayloc goods, and in the presence of stewards, offered to handle if the stewards so instructed; and that, in any event, the stewards' activities, fairly viewed, implemented the general policies the Union had officially approved and sponsored.

We next decide what statements and activities attributed to Union stewards supply support for the complaint within the framework of the principles set forth above. We regard it sufficient, for our purposes, to utilize: (1) only so much of the testimony of management representatives with respect to the stewards as was specifically credited by the Trial Examiner; and (2) testimonial admissions by stewards of certain conduct we deem to be violative of Section 8 (b) (4) (A) of the Act.

Credited management testimony established that, at the Simpson Express Company, Steward Woodbury: (1) told Simpson (the owner) in the presence of other employees, and in response to Simpson's request that Woodbury ask the men to handle the Rayloc freight, that he could not do so; (2) told Simpson and Ryan (the dock foreman), in the presence of other employees and in response to Simpson's question as to what would happen if management agents handled the goods, that "the boys would probably walk off the job"; (3) remained silent when Fulcher, one of the employees, told Simpson, when the latter asked Fulcher to handle the freight that he

(Fulcher) could not do so "if the steward told him not to handle it"; and (4) represented to Simpson, in effect, that the Union's Business Agent would not allow the members to handle or interline the Rayloc freight. Testimonial admissions made on the record by Jimmie Butler, the steward at the Aker's Express Company, established *inter alia*, that: (1) on one occasion, prior to the March 28 membership meeting, Butler told the employees he would file "grievances" against them in the event they handled "scab freight"; and (2) that, on another occasion, after the said meeting, he told "the boys" that "they didn't have to handle the freight" and that if the Company tried to make the employees do so, he could "file grievances" against the Company. We hold that this evidence constitutes direct evidence—in addition to that relating to the conduct of Union officials—establishing that, in violation of Section 8 (b) (4) (A), the Union induced and encouraged employees of Simpson Express and of Aker's Terminal Company to engage in a concerted refusal to handle Rayloc goods.[37]

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[37] In addition to the *Southwestern Motor Transport* case, cited *supra*, we refer to the following cases as supporting the findings and conclusions here reached. *Reilly Cartage Co.*, 110 NLRB 1742, 1745, 1746, note 20; *American Iron and Machine Works*, 115 NLRB 800, 817; *Capital Paper Co.*, 117 NLRB No. 95, adopting pp. 8–9 of the Trial Examiner's report. See also *Roane-Anderson Co.*, 82 NLRB 696, 712–713; *General Millwork Co.*, 113 NLRB 1084, enforced 39 LRRM 2731, 2733 (C. A. 6).

Compare, the Board's holdings that statements made, and acts committed by, supervisors are binding on employers even though the supervisors were not expressly authorized to take the actions, or to make the statements upon which the Board predicated the violation findings. See, e. g., *Drico Industrial Corp.*, 115 NLRB 931; *Hardware Engineering Co.*, 117 NLRB No. 134.

THE EFFECT OF THE UNFAIR LABOR PRACTICE UPON COMMERCE

The activities of the Respondent Union, set forth above, occurring in connection with the operation of Genuine Parts Company and the freight carriers in and around the Atlanta, Georgia, area, who employ members of the Respondent Union, have a close, intimate and substantial relation to trade, traffic, and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

THE REMEDY

Having found that the Respondent Union violated Section 8 (b) (4) (A) of the Act, as set forth above, we shall order it to cease and desist from such conduct. We shall also order it to take certain affirmative action designed to effectuate the policies of the Act. Because of the extensive scope and range of the Respondent's unlawful activities here, we find it necessary, in order to effectuate the policies of the Act, to issue an order broad enough to enjoin the recurrence, throughout the Atlanta, Georgia, area, of the conduct found unlawful in this case. Further, we find it appropriate to incorporate in our order, a provision that the Respondent Union publish a copy of the notice attached to this Decision and Order as the Appendix, in an Atlanta, Georgia, newspaper, of general circulation.[38]

CONCLUSION OF LAW

1. Truck Drivers and Helpers Local Union No. 728, International Brotherhood of Teamsters, Chauf-

[38] See *Capital Paper Co.*, 117 NLRB No. 95, and other cases there cited, where similar requirements have been made in Board orders.

feurs, Warehousemen and Helpers of America, AFL–CIO, is a labor organization within the meaning of Section 2 (5) of the Act.

2. By engaging in, and by inducing and encouraging employees of Simpson Trucking Co., Akers Terminal Co. and of other freight carrier employers in the Atlanta, Georgia, area, employing members of the Respondent Union, to engage in a strike or concerted refusal in the course of their employment to handle freight brought to docks of their respective employers from or by Genuine Parts Company, Atlanta, Georgia, where an object thereof was to force or require such employers to cease doing business with Genuine Parts Company, the Respondent Union has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (b) (4) (A) of the Act.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

ORDER

Upon the entire record in this case and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent Union, and its officials and agents, shall:

1. Cease and desist from engaging in, or from inducing and encouraging employees of Simpson Trucking Co. and of Akers Terminal Co. and of any other freight carrier employers in the Atlanta, Georgia, area, employing members of the Respondent Union, to engage in, a strike or concerted refusal in the course of their employment to process, transport, or otherwise handle or work on goods, articles, or commodities or to perform services for their respective employers, where an object thereof is to force or re-

quire any such employer to cease doing business with Genuine Parts Company or with any other like person or company who has business relations with aforementioned freight carriers in the Atlanta area.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

a. Post at its business offices at Atlanta, Georgia, and at all other places where notices to its members are customarily posted, copies of the notice marked "Appendix."[39] Copies of said notice, to be furnished by the Regional Director for the Tenth Region, shall, after being duly signed by an official representative of the Respondent, be posted by the Respondent immediately upon receipt thereof and be maintained by it for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to members of the Respondent Union are customarily posted. Reasonable steps shall be taken by the Respondent Union to insure that said notices are not altered, defaced, or covered by any other material.

b. Cause a copy of said notice to be printed, at the Respondent Union's expense, in a daily newspaper of general circulation in Atlanta, Georgia.

c. Mail to the Regional Director for the Tenth Region signed copies of said notice for posting at the premises of Genuine Parts Company, Simpson Express Co., Akers Terminal Company, and of other freight carriers employing members of the Respond-

[39] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "PURSUANT TO A DECISION AND ORDER" the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER."

ent Union, if willing, in places where notices to their employees are customarily posted.

d. Notify the Regional Director for the Tenth Region, in writing, within ten (10) days from the date of this Order, what steps the Respondent Union has taken to comply herewith.

Dated, Washington, D. C.

[SEAL] BOYD LEEDOM, *Chairman.*
JOSEPH ALTON JENKINS, *Member.*
NATIONAL LABOR RELATIONS BOARD

PHILIP RAY RODGERS, Member, concurring:

I agree with my colleagues of the majority that the Respondent Union violated Section 8 (b) (4) (A) of the Act. I deem it essential, however, to express my views separately because of certain basic considerations which govern my reasons for reaching this result.

The basic issue in this case arises out of the existence of so-called "hot cargo" clauses in the contracts between the carriers and the Respondent Union and the treatment to be accorded such clauses when they are pleaded as a defense to a complaint alleging a violation of Section 8 (b) (4) (A) of the Act. Without considering the implications of the Interstate Commerce Act, as two members of the majority have done,[40] as I read the National Labor Relations Act and the legislative history that attended the enactment of the secondary boycott provisions, I find no need for going beyond the confines of our own Act

[40] To the extent that the majority opinion holds that "hot cargo" agreements cannot be pleaded as a defense to a complaint alleging a violation of Section 8 (b) (4) (A), I concur therein. See my opinion in *McAllister Transfer*, 110 NLRB 1769, and my concurring opinion in *Sand Door and Plywood*, 113 NLRB 1210.

for holding that "hot cargo" agreements cannot be pleaded as a defense in cases of this type. A basic principle that underlies the Act we are charged with administering is that the parties may not waive rights vouchsafed by the Act. The reason for this is clear. Rights accorded by the statute stem from an overriding consideration clearly expressed in the Act itself "to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce." [41]

In Senate Report No. 105 on S. 1126, the Committee made it clear that the provisions dealing with secondary boycotts were incorporated in the bill "in order adequately to protect the public welfare which is inextricably involved in labor disputes" and that the Board was to act "in the public interest and not in vindication of purely private rights" in pursuing the remedies created by Congress.[42] Indeed, the exclusive grant of authority to the Board to prevent and remedy unfair labor practices affecting commerce [43] was to insure that the existence of private agreements at odds with the statute would not preclude the Board from acting in the public interest.[44] This is wholly consistent with the rule in other areas of the law that private agreements are invalid if they contravene the public interest.[45] It is well established that the statutory protection of the public interest

[41] Section 1 (b) of the National Labor Relations Act.

[42] Senate Report No. 105, p. 8 (1 Leg. Hist. 414).

[43] Section 10 (a) of the National Labor Relations Act.

[44] *Amalgamated Utility Workers* v. *Edison Company*, 309 U. S. 261, 264, 267, 269; *N. L. R. B.* v. *General Motors Corp.*, 116 F. 2d 306 (C. A. 7).

[45] See, for example, *Steele* v. *Louisville Railway Co.*, 323 U. S. 192.

cannot be waived by the agreement of private parties.[46]

Turning to the precise issue under consideration, we are confronted with a statutory proscription of secondary boycotts and an attempt by the Respondent Union to escape that statutory ban by pleading a private agreement. Stated succinctly, we are called upon to decide whether, even though all the elements necessary to establish a violation of Section 8 (b) (4) (A) of the Act are present, a private contract, designed to authorize that which the statute prohibits, can constitute a defense to a complaint alleging such a violation.

As I view it, this situation is essentially analogous to one where an employer and a union conclude an agreement obligating the union to withdraw unfair labor practice charges and to refrain from filing new ones. Clearly, in that case the Board is not prevented by the agreement of the parties from processing charges filed by the union, although such filing was in direct contravention of the terms of the agreement.[47] In those circumstances, the invalidity of the agreement is predicated not on the theory that its execution is in itself an unfair labor practice, but on the theory that the agreement is in derogation of the public policy expressed in the Act. The same rule must perforce be applied in the case of so-called "hot cargo" agreements, for, to permit a union, intent on illegal secondary activity, to secure by private contract what amounts to a personal, private exemption from certain sections of the law is to subsidize circumvention and penalize compliance. Such a course

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[46] 12 Am. Jur. Sec. 166; *Bowersock* v. *Smith*, 243 U. S. 29; *Grandview Inland Fruit Co.* v. *Hartford Fire Insurance Co.*, 109 A. L. R. 1472; *Short* v. *Bullion Beck Co.*, 45 A. L. R. 603.

[47] *N. L. R. B.* v. *General Motors Corp.*, *supra*.

must inevitably lead to the collapse of all reasoned regulation and a return to the "law of the jungle" in labor relations—a law which both the Wagner Act and the Taft-Hartley Act found to be incompatible with a Twentieth Century civilization.

Mindful of these considerations, I cannot subscribe to the view that a "hot cargo" agreement is a valid contract. In my opinion, a "hot cargo" agreement is invalid at its inception. In legal contemplation it is therefore unenforceable. Its intrinsic invalidity stems from its very purpose—the negation of public policy. Those who reason that such agreements are valid base their conclusion in large part on the premise that the "hot cargo" clause has the effect of removing so-called "hot cargo" from the course of the employment of the employees involved, and that therefore conduct which would concededly be violative of the Act in any other circumstance is rendered harmless, because under a "hot cargo" clause such conduct would not occur in the course of the employment of the employees concerned. The weakness of that reasoning is that it claims too much for the phrase and too little for the sentence.

The Sixth Circuit in *Local 11, United Brotherhood of Carpenters & Joiners, et al.* v. *N. L. R. B.*, 342 F. 2d 932, treated this question in some detail. In that case, the Respondent Union's position was that if an employer has agreed in advance that a certain product need not be used by his employees, and he subsequently honors this agreement by acquiescing in the employees' unwillingness to use or work on the product, there can be no "concerted refusal" by the employees "in the course of their employment" to use or work on the product. Similarly, it was argued that their conduct cannot be "in the course of their employment" because the employer has agreed in advance

that their employment would not include working on that product. In effect, argued the union, an employer cannot be "forced or required" to cease handling goods which he had already agreed not to handle. The Court summarized this position as follows:

> These semantic contentions are buttressed by the argument that the primary purpose of Section 8 (b) (4) (A) of the Act is to protect neutral employers from strikes resulting from their desire to use goods produced by another employer engaged in a labor dispute, and that an employer who has agreed in advance not to use such goods needs no such protection.

The Court disagreed sharply with such reasoning. It stated:

> ** * * the primary purpose of Congress in enacting Section 8 (b) (4) (A) was to protect the public interest from strikes or concerted refusals interrupting the flow of commerce at points removed from the primary labor-management dispute. To allow the acquiescence of a single employer to validate conduct contrary to the express language of the statute would be to frustrate this Congressional purpose. And, as pointed out by the Board, the phrase 'in the course of their employment' does not have the restricted meaning originally assigned to it, but rather, Congress 'used this phrase only to distinguish between employees in their capacity of employees and employees in their capacity of consumers.'*[48] (Emphasis added.)

In another case,[49] Judge Prettyman, in commenting on this argument, stated:

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[48] See *Sand Door & Plywood Co.*, 113 NLRB 1240, enf'd 241 F. 2d 147 (C. A. 9).

[49] *General Drivers, et al.* v. *N. L. R. B.*, 247 F. 2d 71 (C. A. D. C.).

I do not agree with the argument that the hot cargo clause has the effect of removing struck goods from "the course of their [the Teamsters'] employment." If such a construction could be placed upon the phrase in Section 8 (b) (4) (A), careful contract draftsmanship could legalize without qualification any otherwise prohibited activity, e. g., the jurisdictional strike, the sympathy strike, and the wildcat strike, by artificially exempting the work involved from the course of the employment governed by the contract. I think the statute cannot thus be nullified.

I concur in the analysis of the Sixth Circuit and the Comment of Judge Prettyman.[50]

As I stated in *McAllister Transfer*, if the structure of the Act is examined, one cannot help but reach the conclusion that if Congress had intended to legalize "hot cargo" clauses, it would have done that by way of a specific exception to the general secondary boycott provisions. This was precisely what Congress did in enacting unfair labor practice provisions in Section 8 (a) (3) of the Act; it specifically provided that contracts conforming to the permissible limits of union security shall be valid. But both the plain language

[50] In this connection, I respectfully disagree with the treatment accorded the phrase "in the course of their employment" by the Second Circuit in its opinion in *Milk Drivers, et al.* v. *N. L. R. B.*, 245 F. 2d 847 (C. A. 2). But see *Douds* v. *Milk Drivers and Dairy Employees Union, Local 584, International Brotherhood of Teamsters, et al.*, (C. A. 2), 40 LRRM 2673, decided October 2, 1957, subsequent to the *Milk Drivers* case. There the Second Circuit affirmed an injunction granted pursuant to Section 10 (1) of the Act against secondary picketing in a case where the Union sought to implement a "hot cargo" clause. Significantly, Judge Lumbard in concurring in the *Douds* case declared that "the decisions of this Court in the *Rabouin* and *Milk Drivers* [cases] seem to me to be contrary to both plain statutory language and the intent of Congress."

of the statute, and the clear background of opposition to secondary boycotts in general and "hot cargo" clauses in particular,[51] make it apparent that Congress had not the remotest intention of carving out an exception in favor of "hot cargo" clauses. Certainly, it did not do so by the use of the words "in the course of their employment."

In this connection, it should be borne in mind that Board policy at the time the amendments to the Act were considered was unalterably opposed to the effectuation of contracts that contravened the objectives of the Act, and that this policy was consistently approved by the courts of the land, including the United States Supreme Court.[52]

For example, in *J. I. Case Co.* v. *N. L. R. B.*, *supra*, at p. 337, the United States Supreme Court stated:

> Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective bargaining agreement. "The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices." *National Licorice Co. v. Labor Board*, 309 U. S. 350, 364. *Wherever private contracts conflict with its functions, they obviously must yield or the Act*

[51] 92 Cong. Rec. 5065 (2 Leg. Hist. 1380).

[52] *J. I. Case* v. *N. L. R. B.*, 321 U. S. 332; *National Licorice Co.* v. *N. L. R. B.*, 309 U. S. 350; *N. L. R. B.* v. *Winona Textile Mills*, 160 F. 2d 301 (C. A. 8); *N. L. R. B.* v. *Reed & Prince Manufacturing Co.*, 118 F. 2d 874 (C. A. 1); *Hartsell Mills Co.* v. *N. L. R. B.*, 111 F. 2d 291 (C. A. 4).

would be reduced to a futility. (Emphasis added.)

Congress, at the time of these enactments, was well aware of this policy, and for that reason it was not called upon to state in the text of the Act that which was already well-established law, namely, that the terms of a private agreement which attempt to evade the proscriptions of the Act shall not constitute a defense to conduct clearly outlawed by the Act.

The violence that "hot cargo" agreements do to the statutory scheme is by no means confined to the secondary boycott provisions of the statute, nor is it confined to the relationships between the individuals signatory to such agreements. These agreements are designed to, and have the effect of, emasculating and undermining other basic precepts of the statute as well. For example, in the *McAllister* case, such clause was invoked against an employer and his cargo became "hot" only after his employees had unanimously rejected the union concerned by means of an election conducted by this Board. In the *Sand Door* case, such clause was invoked against an employer and his goods became "hot" only because his employees were represented by a union other than the union invoking the "hot cargo" clause. Many similar cases can be cited. Thus, if these clauses are allowed to stand, they will have the effect of inviting and compelling the wholesale commission of unfair labor practices by employers throughout the country, and the attendant effect of depriving countless employees of basic rights proclaimed to be protected by this Act.

Presumably, if these clauses are upheld, any employer's product could be labeled "hot cargo" by the union, if that employer refused (a) to recognize a minority union, (b) to displace an established union,

(c) to compel his employees to join a union against their will, or (d) to become a signatory to a "hot cargo" agreement. Presumably, also, a strike on the part of a union to compel employers to sign such agreements would also be legal and, therefore, a protected activity. The violence this would do to the entire framework of the statute is patent.

The widespread use of such agreements would serve to exempt from this section of the Act, the two segments of American industry which Congress felt, in this respect, stood in greatest need of its protection, if the public interest were to be served; namely, the transportation and building and construction industries.

In concluding that a violation of Section 8 (b) (4) (A) occurred in this case, I am, of course, relying on the factual findings of inducement and encouragement of employees of secondary employers and the proscribed objective. I am in no sense including the existence of the "hot cargo" agreement as an element of that violation. I am simply saying that, when all of the elements of a violation are present, a "hot cargo" clause cannot be pleaded as a defense, because such agreements are in derogation of the public policy expressed in the Act and cannot, therefore, serve to immunize and condone unlawful conduct. As I see it, this is the only result that is consistent with sound statutory construction.

As I am satisfied that Section 8 (b) (4) (A) has been violated by the Respondent Union for the reasons stated above, I join in the ultimate findings of the majority.

Dated, Washington, D. C.

PHILIP RAY RODGERS, *Member.*
NATIONAL LABOR RELATIONS BOARD

STEPHEN S. BEAN, Member, concurring:

I agree with the other members of the majority in this case in finding, upon the facts which have been set forth describing the conduct of the Union's officials, that the Respondent Union violated Section 8 (b) (4) (A) of the Act. However, my concurrence in their view that the "hot cargo" provisions of the contracts here involved constitute no defense to the complaint, is predicated solely on the theory set forth by the Board's majority in the *Sand Door*[53] case. As do my colleagues, I recognize the obligation resting upon this Board, in effectuating the Congressional intent, to give heed to the necessity which often exists for "careful accommodation of one statutory scheme to another,"[54] and not to pursue the purposes and policies of the Labor Relations Act with such single-minded devotion as to be blind to the Congressional objectives embodied in other enactments. Indeed, only recently, I have joined in a decision wherein the Board held that, in a situation where this Board and another Federal agency were both required to interpret the same statutory provision;[55] considerations of comity between Governmental agencies dictate that the views of the agency primarily concerned with administration of the statute in question should be followed as the guide to its interpretation. The cases cited by my majority colleagues do not, however,

[53] *Sand Door and Plywood Co.*, 113 NLRB 1210.

[54] *Southern Steamship Company* v. *N. L. R. B.*, 316 U. S. 31.

[55] *Olaa Sugar Company, Limited*, 118 NLRB No. 195, wherein the issue concerned the definition of agriculture appearing in the Fair Labor Standards Act which this Board has been required, by rider to its own appropriations act, to follow in interpreting the exclusion of "agricultural laborer" from the definition of "employee" in the Labor-Management Relations Act. See also *Imperial Garden Growers*, 91 NLRB 1034.

appear to me to demonstrate that the ICC has yet spoken with finality concerning the validity, under the statute which it administers, of a "hot cargo" contractual provision. And I find nothing in the existing Board doctrine as set forth in the *Sand Door* case which would seem to impinge either upon the interpretation attributed by my colleagues to the provisions of the ICA or might seem likely to impinge upon any such interpretation which the agency charged with administration of that statute may yet adopt. If later events should prove that I am wrong, I feel sure that there will be opportunity for this Board to make any necessary accommodation of its doctrine to the policies of the ICA. For these reasons, I find it unnecessary to rely upon any other or further principles than those set forth in the Board's *Sand Door* decision for the determination of this case.[56]

Dated, Washington, D. C.

STEPHEN S. BEAN, *Member.*
NATIONAL LABOR RELATIONS BOARD

ABE MURDOCK, Member, dissenting:

The decision of the majority in this case, finding, for different reasons, a violation of Section 8 (b) (4) (A) is, in my opinion, of extraordinary importance. Its importance lies in the fact that two members of this majority have now taken the position that the *mere existence* of a "hot cargo" contract between a common carrier and a union may be evidence

[56] On a factual basis, however, I also find it unnecessary to reach or to decide that portion of this case which deals with the acts and statements of stewards, in view of the determination herein that the acts of admitted union agents are such as to support the complaint. I neither adopt nor pass upon the determination made in the principal opinion upon this phase of the case.

of a violation of this Section of the Act. Never before has any member of this Board or of any court adopted so extreme a view. Only one member of the majority now adheres to the majority position in *Sand Door and Plywood Company*, 113 NLRB 1210; aff. 241 F. 2d 147 (C. A. 9) and *American Iron and Machine Works*, 115 NLRB 800, reversed in part, 247 F. 2d 71 (C. A. D. C.), *sub nom General Drivers Union* v. *N. L. R. B.* These decisions, the most recent Board pronouncements in this area of the law, are now before the Supreme Court of the United States on certiorari.

The main majority opinion correctly notes that the "hot cargo" contracts in this case are not alleged by the General Counsel to be illegal. Accordingly, the Trial Examiner has not passed upon this issue and the parties have not litigated it. But despite this fact, that opinion purports to hold that unions and their members "cannot, as a matter of law, enjoy, exercise, or assert any of the 'hot cargo' privileges such contracts purport to grant and that any attempt so to do for the purposes sought to be served by such contracts exposes the unions to liability under Section 8 (b) (4)." This *dicta* is of such extraordinary importance and so novel that it should be decided only after the most thorough consideration with full notice that such an issue is being litigated and full opportunity for all parties to be heard, to examine and cross-examine witnesses, to introduce relevant evidence, and to make argument on it to a Trial Examiner and to the Board. This is the very minimum of due process.

I have in other decisions fully set forth my views as to the legality of union conduct pursuant to an employer's contractual agreement not to require its employees to handle the goods of another employer.

See the dissenting opinions in *Reilly Cartage Co. et al*, 110 NLRB 1753; *McAllister Transfer Co., et al.*, 110 NLRB 1790; *Sand Door and Plywood Company*, 113 NLRB 1222; *American Iron and Machine Works*, 115 NLRB 803. These dissenting opinions are in conformance with decisions of the Court of Appeals for the Second Circuit, *Rabouin d/b/a Conway's Express* v. *N. L. R. B.*, 195 F. 2d 906, most recently reaffirmed in *Milk Drivers Union* v. *N. L. R. B.* (*Crowley's Milk Co.*,) 245 F. 2d 817 (June 19, 1957). The dissenting opinion in *American Iron and Machine Works, supra*, as it pertains to the contracting union, has most recently been adopted by the Court of Appeals for the District of Columbia in *General Drivers Union* v. *N. L. R. B.*, 247 F. 2d 71 (May, 1957), reversing to that extent the majority's contrary decision.

The court's decision in the latter case has particular relevance to the decision of the majority here. The court reasoned as follows:

> If an employer may lawfully agree that its employees will not be required to handle freight from a struck company, and such a situation arises, it is hard to see how it can be said that, simply because the employees do what they have a right to do, there was a strike or refusal to work.

This, in my opinion, is the short answer to the argument that such an agreement is invalid because it is "in derogation of the public policy expressed in the Act." So far as I can determine there is not a word in Section 8 (b) (4) (A) or its legislative history to suggest, even remotely, that Congress intended to restrict the right of an employer to do business or to cease doing business with another employer. Nor is there any language in the Statute

which can be interpreted as forbidding a union to seek and obtain a contract whereby an employer agrees that he will not do business with another employer engaged in a labor dispute. Whether or not there should be such a prohibition in the Act is a matter for the Congress to decide. But to say that Congress has already established a public policy invalidating the execution of "hot cargo" contracts does not comport either with the language or purpose of Section 8 (b) (4) (A). That Section of the Act, as the Board and the courts have frequently held, forbids *strikes* or *inducements to strike* with an object to force a neutral or secondary employer to cease doing business with another employer. Neither the means, a strike or an inducement to strike, nor the object, a cessation of business, is, standing alone, unlawful. The *means* becomes unlawful when it is established that such an object exists. The "general secondary boycott provisions" of this Statute do not afford a basis for holding that the mere cessation of business between two employers, whether by contract or otherwise, has been proscribed by Congress. Obviously, therefore, no "specific exception" to such provisions was deemed necessary by Congress in order "to legalize" such contracts. Congress simply has not legislated with regard to this matter. The public interest with which Congress was concerned was directed against secondary *strikes* and the consequent involvement of *neutral* employers in controversies not theirs. It was not intended to protect *primary* employers from primary strikes or from contracts which enlisted the support of other employers.

When the *American Iron and Machine Works* case was before this Board the majority held that a union's "appeals to employees" not to handle "hot cargo" notwithstanding their contractual right to be

free from such work was a violation of Section 8 (b) (4) (A). The dissenting opinion pointed out that such broad language, carried to an absurd extreme, might be interpreted as forbidding a union to "discuss a hot cargo clause at a membership meeting." That extreme is now the factual basis of the majority's decision in the instant case.

To the extent the majority finds that the Respondent Union *sponsored* a strike or *induced* employees to engage in a strike its decision, in my opinion, is *factually* incorrect. To the extent two members of the majority assume power to determine public policy under a different federal Statute regulating interstate transportation at a time when decisions of this nature[57] are pending before the tribunal selected by Congress to determine such issues in the first instance, their decision, I believe, intrudes on the exclusive jurisdiction of the Interstate Commerce Commission.

As I read the several opinions of the majority in this case, there is no majority decision that these "hot cargo" contracts are in and of themselves violative of Section 8 (b) (4) (A), as only two members of the Board so hold. The Union's conduct *in this case* must therefore be considered in the context of a lawful agreement, granting certain rights to its members with respect to the handling of "unfair goods." It is to be noted that the U. S. District Court for the Northern District of Georgia, Atlantic Division, denied the application of the General Counsel for a preliminary injunction under Section 10 (1) of the Act

[57] *Galveston Truck Line Corporation* v. *Ada Motor Lines, Inc., et al.*, Case No. MC-C-1922, Report and Recommended Order issued by ICC Hearing Examiner on April 8, 1957; *Nebraska Short Line Carriers, Inc., Common Carrier Application*, No. MC-116067 (Sub-No. 2) Report and Recommended Order issued by ICC Hearing Examiner on August 8, 1957.

on the ground that there was no reasonable cause to believe that the Respondent Union had violated Section 8 (b) (4) (A). The facts upon which the Court relied in that case are substantially the same as those presented here. In its opinion the court adverted to the affidavits of officers of the Union and "more than 230 employees of the carriers involved to the effect that their action in refusing to handle goods of Genuine and Rayloc was their voluntary and individual decision and that the officers of the respondent Union did not in any way order, instruct, direct or appeal to such employees not to handle such goods, and that no officers or agent of the respondent Union has in any way induced or encouraged the employees not to handle the freight of Rayloc or Genuine Parts." The Court could not agree with the General Counsel that a union's *advice* to its members as to the rights guaranteed to them by a lawful contract constituted unlawful inducement to engage in a secondary boycott. Indeed, the record in this case shows that the union official who presided over the special meeting made it absolutely clear to the membership that his *sole* purpose was to determine their *individual* intentions with regard to the handling of Rayloc goods; that their contracts with the carriers gave them the right to make a personal decision; that the Union would not in any manner attempt to tell them what to do. Moreover, following passage of a resolution expressing the members' individual intentions, the presiding official again advised the membership that this resolution did not bind any one of them to refuse to handle unfair goods; that they were, as previously, free to handle or not to handle such goods no matter how they had voted. It is particularly revealing that the presiding official had previously rejected a motion from one of the members to the effect that union members would

refuse to handle Rayloc goods. He told the members that such a motion might be interpreted as union action whereas the Union wanted to maintain a neutral position and to leave the queston of handling Rayloc goods to each member as an indivdual. The recital of facts in the majority opinion ignores this step.

It is the conclusion of the majority that the exercise by individual employees of their rights under these contracts was an "integral part" of a union program to achieve this result. The "proof" upon which the majority relies consists of: (1) the fact that individual employees did refuse to handle "hot cargo"; (2) the fact that a meeting was called to determine their intentions, as individuals, on this issue; (3) the fact that a resolution was adopted by the members at this meeting which, after reciting the pertinent provisions of the "hot cargo" contracts, stated that "each of the members has made and now announce(s) his individual voluntary decision not to hand(le) such goods;" and (4) the fact that the Union offered to protect any employee from retaliatory action by his employer in the event the employee decided, pursuant to his individual right under the contract, not to handle Rayloc goods.

It is as clear to me as it was to the District Court that these facts do not add up to a union-sponsored strike or union inducement of employees to engage in a strike. I know of no way in which this Union could have dissociated itself more clearly from the individual views of its members or the exercise of their individual rights. It is true, of course, that the Union could have ignored the fact that its members were entitled under their contracts to make a personal decision on the handlng of the unfair goods. It could have refused to provide them with the forum for the expression of their individual intentions. It could

have reneged on its obligation under the contracts to inform the employers of the intentions of its members. Having gone this far, it could also have denied employees the protection of their union in the event their employers, in violation of the contracts, retaliated against those who elected not to handle unfair goods. Apparently, this is the only course that the majority believes would have been proper for the Union in this case.

To support its finding that the Union's conduct in this case constituted unlawful inducement under Section 8 (b) (4) (A) the majority relies upon the decision of the Supreme Court in *International Brotherhood of Electrical Workers* v. *N. L. R. B.*[58] The decision of the court in that case, however, is not even remotely related to the facts that appear in this record. There the court faced the issue of whether Section 8 (c) immunized peaceful picketing "even though the picketing induces a secondary boycott made unlawful by Section 8 (b) (4)."[59] In quoting "pertinent language" from this decision the majority omits the topic sentence of the quoted paragraph, which reads as follows:[60]

> "a. To exempt peaceful picketing from the condemnation of Section 8 (b) (4) (A) as a means of bringing about a secondary boycott is contrary to the language and purpose of that section. The words 'induce or encourage' are broad enough to include in them every form of influence and persuasion . . ."

It would seem clear, therefore, that the words "influence and persuasion", as used by the Supreme Court, were intended to embrace conduct, such as

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[58] 341 U. S. 694.

[59] *Ibid*, at page 701.

[60] *Ibid*, at pages 701–2.

peaceful picketing, whereby the union sought *affirmatively* to induce, encourage or persuade employees to engage in a strike for a forbidden objective. However broad those terms may be, they are not broad enough to include advice by a union to its members that, as individuals, they have a contractual right to refuse to perform certain work, particularly where, as here, they are also advised that each member must make a decision for himself and, having made it, is free at any time to reverse himself. To hold, as the majority does, that persuasion and influence resulted from "an incident of a 'good faith' attempt by Union officials to perform an intra-union duty to 'advise' the members" seems to me to do violence both to the Supreme Court's decision and the statutory language upon which it is based.

In addition to its finding of "union sponsored" action the majority finds that certain remarks and the silence of individual job stewards in connection with the handling of Rayloc freight constitutes "direct evidence" that the Union violated Section 8 (b) (4) (A). The majority predicates this finding on the ground that the stewards were agents of the Union and "were expressly vested with sufficient authority so to act, as to warrant the inference that the actions here attributed to them fell within the scope o' the delegated powers." The record in this case shows contrariwise, however, as the district court found, that these stewards were *expressly limited* in their authority to act on behalf of the Union with regard to strikes or other interruptions to the Employer's business. Article V of the collective bargaining agreement provides as follows:

> The Employer recognizes the right of the Union to designate a job steward and alternate to handle such Union business as may from

time to time be delegated to them by the Union. *Job stewards and alternates have no authority to take strike action or any other action interrupting the Employer's business in violation of this Agreement, except as authorized by official action of the Union.* (Emphasis supplied.)

The Employer recognizes this limitation upon the authority of job stewards, and their alternates. The Employer, in so recognizing such limitations, shall have the authority to render proper discipline, including discharge without recourse to such job steward or his alternate, if he be an employee, in the event the job steward or his alternate has taken unauthorized strike action, slow down, or work stoppage in violation of this Agreement . . ."

It is well established that the term "agent" as used in this Statute means an agent under the common law rules of agency.[61] Application of such rules makes it clear that the above contractual provision, signed by the Employer and open to the employees' inspection, specifically removed from the stewards' authority any right on their part to speak for the Union in calling for unauthorized work stoppage or otherwise interrupting the Employers' business. Section 167 of the *Restatement of the Law of Agency* states the rule as follows:

> If a third person dealing with an agent has notice that the agent's authority is created or described in a writing which is intended for his inspection, he is affected by limitations upon the authority contained in the writing, unless misled by the conduct of the principal.

Based on the foregoing I can only conclude that the ambiguous comments of the stewards and their silence on several occasions in connection with the intention

[61] *Sunset Line and Twine Company*, 79 NLRB 1487.

of employees to work on Rayloc goods was, if considered an inducement to strike, beyond the scope of their authority as agents of the Union.

I turn now to the last and, in my opinion, most important issue in this case. Two members of the majority have undertaken to find a violation of Section 8 (b) (4) (A) by reference to, and incorporation of, the Interstate Commerce Act, which requires that common carriers generally must provide service without discrimination. While purporting to limit their decision to such employers, they rely, nevertheless, upon the entire legislative history of Section 8 (b) (4) (A) to find that "the 'hot cargo' contracts here involved are repugnant to the basic policies of the Act and in conflict with the public rights this Board is under a duty to protect." I have already discussed public policy as it relates to this Section of the Statute. I am not aware of, nor have I been able to discover, any additional legislative history creating a distinction between secondary boycotts affecting common carriers and those involving other employers. I shall therefore restrict my discussion of this phase of the case to the issue, raised in the main opinion only, that "where the contracting employers are common carriers the existence of the Interstate Commerce Act destroys" the argument that under Section 8 (b) (4) (A) employers are free, at will, to cease doing business with any individual and to agree to this result. To what extent common carriers are or are not free under the Interstate Commerce Act to restrict their service to shippers is a matter to be decided by the agency established by Congress to make such initial decisions. To my knowledge the Board has never purported to decide a question arising under another Statute at a time when a decision involving that question is pending before the agency charged with the

administration of that Statute. Two questions now pending before the Interstate Commerce Commission are (1) whether a common carrier is excused from his duty to transport freight because he has agreed by contract with a union not to handle unfair goods,[62] and (2) whether the public convenience requires the granting of an application for interstate operation of a carrier where the applicant charges that shipments have been refused by established carriers because the latter are bound by "hot cargo" contracts with unions representing their employees.[63] The decision of the Commission may or may not be favorable to the theory that a common carrier's refusal to accept shipments because of the existence of a "hot cargo" contract is a reasonable regulation or practice in connection with his duty to provide "safe and adequate service." Obviously, neither I nor my colleagues can now foreteh what that decision will be. The applicable provisions of the Interstate Commerce Act are contained in 49 U. S. C. 316 (b) and 316 (c) as follows:

> It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, observe, and enforce just and reasonable rates, charges, and classifications, and *just and reasonable regulations and practices relating thereto* . . .
>
> Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers . . . In case of such joint rates, fares, or charges it shall be the duty of

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[62] *Galveston Truck Lines Corporation* v. *Ada Motor Lines, Inc.*, *supra*, ftn. 57.

[63] *Nebraska Short Line Carriers Inc., Common Carriers Application*, *supra*., ftn. 57.

the carriers parties thereto to establish *just and reasonable regulations and practices in connection therewith* . . . (Italics added).

The Commission is the *sole* tribunal authorized by Congress to hold, subject to review by the courts, that the regulations and practices of a particular common carrier, including its reliance upon "hot cargo" contracts in refusing to accept shipments, are either reasonable or unreasonable. Granted that the Board has a duty "not to ignore the other and equally important statutory schemes in administering our statute," that duty does not extend to a pronouncement of the law under such a statute *before* the tribunal charged with its enforcement has spoken. Section 8 (b) (4) (A) forbids a labor organization or its agents "to engage in, or to induce or encourage the *employees* of any employer to engage in, a strike . . ." (Italics added) for a proscribed objective. It does not forbid, and the Board has consistently so held, the inducement of *employers*. Now two members of the majority say that the Board has a duty to accommodate this statute to that of the Interstate Commerce Act by holding that a carrier-employer may not, at the request of a union, voluntarily agree to boycott the goods of another employer. They hold that the mere [illegible] such a contractual right "exposes the un-

[illegible] as to the reasonableness of rules, regulations, and tariffs are for the Interstate Commerce Commission, and [illegible] unreasonable by it, a shipper may not maintain an action in any court against a carrier upon the claim that any rule or regulation is unreasonable and that through its enforcement he has sustained loss or damage." *Rice v. Ohio R. Co.*, 299 U. S. 415, 426, 57 S. Ct. 321, 77 L. Ed. 838; *Pennsylvania R. Co. v. Puritan Coal Mining Co.*, 237 U. S. 121, 131, 35 S. Ct. 484, 59 L. Ed. 867.

Interstate Express, Inc., 92 NLRB 2032; *Southlight Pacific [illegible]*, 94 NLRB 271.

tion to liability under Section 8 (b). (4)-(A)." This, it seems to me, is something more than accommodation of our Act to the Interstate Commerce Act. It is legislation. Such a result was carefully avoided by the Court of Appeals for the Eighth Circuit in *Meier & Pohlmann Furniture Company* v. *Gibbons* 38 LRRM 2533, 2540-41 (April, 1956). Faced with this issue in a suit by a shipper for damages, the court would not presume to hold that "hot cargo" contracts were contrary to the public policy of the Interstate Commerce Act. Rather, the court looked to the Labor Management Relations Act to determine, first, whether such contracts were legal and, second, whether they constituted a defense to conduct otherwise violative of the Act. The court pointed out that this Statute proscribed secondary boycotts by labor organizations, but that "the prohibition does not extend to individual members of such organizations or to the employer." The court pretermitted consideration of the *Contract's Express* rule in view of contrary Board decisions. Unlike this Board, that court has jurisdiction with regard to questions under both the Interstate Commerce Act and the Labor Management Relations Act. It seems to me that two members of the majority in this case are doing without statutory authority what that court with such authority has refused to do.

Neither of the Hearing Examiners in the cited cases before the Interstate Commerce Commission purported to pass upon the legality of the "hot cargo" contracts. In one case[28] the Examiner held that such an issue was "beyond the Commission's proper sphere of activities." He found that the Commission was concerned with the lawfulness of the actions of the

[28] *Galveston Truck Line Corporation* v. *Ada Motor Lines, Inc.*, *supra*, fn. 57.

carriers "without regard to any contract which the carriers may have executed with a third party." In the other case[87] the Examiner found that "it would be unwise to attempt to use the certificate provisions of the Act to compel carriers to cross picket lines or to defy or ignore the actual or implied threats of their recognized union." He held that whatever defects in service resulted from the carriers' "hot cargo" contracts such defects were insufficient to warrant the conclusion that their services and interchange practices were inadequate for public convenience and necessity. It would seem quite reasonable to me that a labor relations contract *unlawful under the Labor Management Relations Act,* urged by the carrier in a case before the Interstate Commerce Commission as an excuse for his failure to transport freight, might be considered by that body an untenable defense. But it does not follow that a contract, lawful under the express provisions of this Statute, becomes unlawful because it may be held to be inadequate as a defense to a charge that a particular carrier has imposed an "unreasonable" regulation in the transport of freight. Indeed, the Commission itself has specifically refused to express any opinion with regard to the legality of a contract between a carrier and a union which provided for a closed shop and contained a clause exonerating employees from the duty to cross a *bona fide* A. F. of L. picket line. The complainant had argued that the contract was incompatible with the carrier's duty to serve the shipper's plant. The Commission rejected this argument, holding that the question "*is a matter involving the labor relations between the carriers and their employees over which we have no*

[87] *Nebraska Shore Line Carriers: Common Carrier Application, supra,* ftn. 57.

jurisdiction." (Emphasis added.) *Montgomery Ward & Co., Inc.,* v. *Consolidated Freightways,* 42 M. C. C., I. C. C. 225, 235. The Commission went on to find that the carrier in that case had acted reasonably in refusing to serve the shipper as a result of a strike at the shipper's plant for which the carrier was not responsible. The issue of the contract's validity under the public policy of the I. C. C., raised by the main opinion in the instant case, is an issue that the Commission itself has refused and presumably will continue to refuse to consider. This is so because the function of the Commission is to decide whether a carrier has acted "reasonably", *regardless of the legality or illegality of his contractual commitments.* I take it the Commission has the power to decide that a carrier has acted unreasonably because he has refused to transport freight as a result of a lawful strike of his own employees. Is it then the duty of the Board, under the main opinion's theory, to hold that such a strike is contrary to the public policy of the Interstate Commerce Act and therefore unlawful under the Labor Management Relations Act? If this is so, how will my colleagues answer the mandate from Congress under Section 13 of the Act: Nothing in this Act, *except as specifically provided for herein,* shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." Will they say that the strike is unlawful because the Board has a duty to accommodate this Statute to that of the Interstate Commerce Act?

If I understand the "summarized" purpose of the main opinion it is a holding that the Board may in this case impose a qualification upon an employer's right to choose his customers because "the ICA in itself restricts and qualifies the common carriers'

freedom of choice in the respects noted." As indicated above, no decision of the ICC has ever, in fact, so restricted a common carrier. A blanket rule by the ICC forbidding common carriers to execute or rely upon "hot cargo" contracts under any circumstances would seem on the basis of their existing precedents an unlikely possibility. In any event, the boycotting of shippers by common carriers subject to the ICA, whether or not at the request of any persons, is a subject matter over which this Board has absolutely no jurisdiction. As Member Bean points out in his concurring opinion, this is not a situation where the Board and another federal agency are both required to interpret and apply the same statutory provisions. Even in such a situation the Board normally defers, as a matter of comity, to the views of the agency primarily entrusted with the administration of the Statute in which such a provision occurs. The ICC is charged by Congress with the duty of regulating the operations of common carriers among the several States. This Board is charged with the duty of enforcing a proscription of secondary boycotts. Comity between governmental agencies does not require that the ICC find a common carrier in violation of the ICA because the Union representing its employees has engaged in a secondary boycott affecting the operations of the common carrier. Comity does not require that the Board find a union's conduct, otherwise lawful, unlawful under Section 8 (b) (4) (A) because a common carrier has, at the union's request, violated the provisions of the ICA.

This Board does not have unlimited authority to find unfair labor practices not proscribed by Congress or to excuse such practices if proscribed by Congress. So far as is here pertinent, to find a violation of

Section 8 (b) (4) (A) it must be proved by the General Counsel by a preponderance of evidence that a labor organization or its agents: (1) has engaged in a strike; or (2) induced employees to engage in a strike or concerted refusal in the course of their employment to transport goods with an object; (3) to force or require their employer; (4) to cease doing business with any other person.

The quantum of proof required by the Statute and all decisions of this Board and the courts, for an 8 (b) (4) (A) violation, would be reduced by the decision of two members of the majority as follows: It is *prima facie* proof of a violation of Section 8 (b) (4) (A) if (1) a union has a contract with a common carrier whereby the latter has agreed not to handle unfair goods; and (2) if a shipper of "hot cargo" has been denied an opportunity to utilize the transportation facilities of the carriers. I point out that what is stated to be "proof" of a violation of Section 8 (b) (4) (A) does not require a scintilla of evidence that a strike has occurred, or that any employee has been induced to strike, and requires only a minimum of evidence that any employer has been forced or required to cease doing business with another person.

Public policy, whatever it may be under the Interstate Commerce Act or, indeed, under this or any other Statute is not a substitute for evidence of a *fact*. The *fact* required by Congress under Section 8 (b) (4) (A) is that a *union has engaged in or induced employees to engage in a strike*. The Board is without power to hold that public policy against "hot cargo" contracts creates a violation of Section 8 (b) (4) (A) where none would otherwise exist. Whether "hot cargo" contracts are desirable or undesirable, whether or not they should be *per se* unlawful

is a matter for Congress, and Congress alone, to decide. To hold that the mere *existence* of these contracts may be a violation of Section 8 (b) (4) (A) seems to me outright legislation. Assuming, arguendo, that the Interstate Commerce Commission would ultimately decide that these carrier-employers violated their duty under the Interstate Commerce Act when they executed "hot cargo" contracts, the question must still be answered in this case whether the employers had, in *fact*, lawfully or unlawfully, authorized their employees to refuse to handle "hot cargo". If such authorization was given and continued, it is immaterial so far as the Union is concerned that the employers acted improperly. The union's only obligation under Section 8 (b) (4) (A) is to refrain from striking or inducing employees to strike. This Section of the Act, wisely or unwisely, does not proscribe other means used by the union to achieve its objectives. I must point out that the decision of two members of the majority in this case goes much further than the majority's decision in the *Sand Door* case, *supra*, where the majority found *actual inducement of employees by an overt act of the Union*. Here, without such evidence, the main opinion holds that a contract, granting employees the right not to handle hot cargo, *proves* that the union, party to such a contract, has induced employees to refuse to work against the wishes of their employer. This is as much as to say that when an employer says "no" he means "yes." Under such a theory a union induces *employees to strike* when it induces an *employer not to require them to work*. It goes without saying that the Board has never been authorized by Congress to hold that a union violates Section 8 (b) (4) (A) merely because a shipper has been denied an opportunity to use the transportation facilities of a

carrier pursuant to an agreement between the latter and the union. It would also seem axiomatic to me that an employer's agreement with a union to deny services to another employer cannot be considered a substitute for evidence of a strike or inducement of employees to strike. In my opinion, this Board should look to its own house and let the Interstate Commerce Commission, with the help of Congress and the courts, fortify and effectuate the purposes of that Act.

Dated, Washington, D. C.

ABE MURDOCK, *Member.*
NATIONAL LABOR RELATIONS BOARD

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IN THE

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OCTOBER TERM, 1957

No. 273

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PETITIONER

v.

GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 886, AFL-CIO,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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I.

QUESTION PRESENTED

Whether union inducement of employees of motor carriers not to handle freight of other struck or unfair employers pursuant to an agreement between the union and such motor carriers that the latters' employees "shall not be allowed to handle or haul freight to or from an unfair company" constitutes a violation of the secondary boycott provisions of Section 8(b)(4)(A) of the National Labor Relations Act.

II

ARGUMENT

The Board (four members thereof), in this and similar cases involving the use of the so-called "hot cargo" clause, has specifically affirmed the validity of such clauses under the Act and the right of employers and unions to negotiate concerning them, but nevertheless the Board (two members dissenting) here asserts that the union parties to such clauses cannot seek to enforce them according to their terms by requesting their members, when the occasion arises, to refrain from handling freight from struck or unfair employers, at least where the employer parties to such agreements desire to repudiate them, and perhaps (as here in the case of Leeway) even when they do not. For a Board that has been set up by Congress under an Act designed to promote the establishment (Sec. 1 and Sec. 7 of the Act) and the stability (Sec. 301 of the Act) of the collective bargaining process, the foregoing proposition would appear untenable on its face, encouraging as it does the willful disregard by employers of solemn and admittedly lawful commitments made in the give and take of across-the-table bargaining. Accordingly, for reasons which will be briefly summarized hereafter, and in view of the strong opinions repudiating the Board's views rendered by the court below and by the Court of Appeals for the Second Circuit in *Milk Drivers and Dairy Employees Local Union 338 v. National Labor Relations Board*, decided June 19, 1957, 40 LRRM 2279—opinions far overshadowing in logic and reasoning the conflicting decision of the Ninth Circuit in *National Labor Relations Board v. Local 1976, United Brotherhood of Carpenters*, 241 F. 2d 147—it is respectfully submitted that there is no reason for extended consideration by this Court of the Board's decision in this and similar cases involving the question of the enforceability of the "hot cargo" clause, and that the Board's petition

herein should, along with the union's petition in the Local 1976 case, *supra*, (No. 999, October 1956 Term), be disposed of in a per curiam decision affirming the decision of the Circuit below and that of the Second Circuit in the Local 338 case.

Without attempting detailed argument, respondent tenders the following considerations in answer to the Board's current position respecting the enforceability of "hot cargo" agreements.

1. The legislative history as well as the language of Section 8(b)(4)(A) make it entirely clear that the Congress had no intention either of outlawing "hot cargo" agreements in their entirety or of denying their enforceability. Use of such agreements was common practice in major segments of American industry for many years prior to Taft-Hartley and, indeed, prior to the Wagner Act. Almost since the earliest days of organized labor it has been customary for sympathetic employers to cooperate with unions engaged in labor disputes by refusing to deal with other employers involved in such disputes. Such cooperation was extended, sometimes voluntarily, at other times upon union request, and at still other times as a result of previous agreements, but in all cases the employer was motivated to extend such cooperation by one or more of the following considerations (set forth by the Board in its brief before the Second Circuit in *Rabouin d/b/a Conway's Express v. National Labor Relations Board*, 195 F. 2d 906): "He may desire to aid the union lest substandard employment terms at the struck plant introduce undesirable competitive practices resulting from lower labor costs; the union may grant him a concession on other issues in exchange for his assistance; he may feel that preservation of harmonious relations with the union is preferable to doing business with the struck employer; or he may be convinced of the rightness of the union's cause."

Had Congress wished to outlaw or stultify the traditional "hot cargo" agreement, it could easily have done so by ex-

press language, as it did in the case of the "closed-shop" agreement proscribed under the provisions of Section 8(a)(3); that there is no specific language of proscription in respect to "hot cargo" is significant. Furthermore, the bare language of Section 8(b) (4) (A) operates to proscribe only such involvement of neutrals in the disputes of others as has been *involuntarily* induced by actual *strike* action, not voluntary involvement, and not even involvement that has been caused by threat of strike directed to the neutral employer as distinguished from his employees. As noted by the Second Circuit in *Conway Express, supra*, Congress, during the discussions preceding the passage of Taft-Hartley, expressly rejected a proposal that would have outlawed involvement of neutrals induced by threat of strike, and the Board and the courts have consistently ruled that the proscriptions of Section 8(b (4) (A) do not reach such threats and that unions are free to seek to induce neutral employers to aid a union's cause by refusing to handle unfair or struck goods by any and all means other than inducement of the neutral's employees to strike.[1]

A final and most conclusive indication of Congressional intent respecting the validity and enforceability of "hot cargo" agreements lies in the fact that both in 1954 and in 1956 Congress expressly rejected attempts to outlaw or restrict the use of "hot cargo" agreements. (Cong. Rec. May 6, 1954, p. 579, and S. 3842 introduced by Senator Curtis of Nebraska, May 14, 1956, 84th Cong. 2d Sess.). *Cf. United States v. International Boxing Club*, 348 U. S. 236, 244.

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[1] *Sealright Pacific, Ltd.*, 82 NLRB 271; *Lewis Karlton d/b/a Consolidated Frame Company*, 91 NLRB 1295; *Local Union 878, International Brotherhood of Teamsters, etc. (Arkansas Express, Inc.)*, 92 NLRB 255; *Schatte* v. *International Alliance*, 182 F. 2d 158 (C.A. 9), cert. denied 340 U.S. 827; *Rabouin* v. *N.L.R.B.*, 195 F. 2d 906; *N.L.R.B.* v. *Electrical Workers, CIO*, 228 F. 2d 553 (C.A. 2), decided December 22, 1955.

The foregoing considerations also serve to refute the Board's contention that the Congress was concerned with protecting not only the neutral employer against so-called "secondary" activities and involvement in the disputes of others, but also with protecting the interests of the general public. The legislative history indicates that Congress was concerned only with innocent third party neutrals and undertook to protect *only* the employer who was being involuntarily drawn into the labor disputes of other employers with which the neutral had no concern through means of union-induced strikes of the neutral's employees.[2]

If indeed, as argued by the Board, it was the purpose of Congress to protect the general public as well as the third party neutrals from the secondary boycott disruptions, why did Congress vote down provisions of the House bill which would have made it unlawful for unions to cause such disruptions by threats of a strike directed against a neutral employer himself? Why did Congress leave unions free to attempt to induce customers of neutral employers to boycott the neutral for the purpose of forcing the neutral to stop dealing with the primary employer? *Brewery & Beverage Drivers v. N.L.R.B. (Washington Coca-Cola* case), 95 U. S. App. D. C. 117, 220 F. 2d 380. Why did not Congress interdict the voluntary as well as the involuntary refusal on the part of neutrals to deal or do business with other employers engaged in separate labor disputes? Surely, the failure of Congress to take preventive measures in these situations does not reveal the broad concern with the public interest contended for by the Board. As far as the public is concerned, the flow of commerce between

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[2] See 93 Cong. Rec. 3834, 2 Leg. Hist., 1005-1006; 93 Cong. Rec. 6445-6446 in 2 Leg. Hist. 1544; 93 Cong. Rec. 4199, 2 Leg. Hist. 1107, 1108; 93 Cong. Rec. 4322 (April 29, 1947); House Report No. 245 on H.R. 3020, 80th Congress, 1st Sess., p. 23; Senate Report No. 105 on S. 1126, supplemental views, p. 54, 1 Leg. Hist. 540; 93 Cong. Rec. A1295.

the neutral and the primary employer is disrupted to exactly the same extent whenever the neutral ceases to do business with the primary employer, whatever the reason for the neutral's cessation may be.[3]

2. In addition to the entire lack of any evidence of legislative intent to proscribe the "hot cargo" agreement or its use, it is clear, as found by both the court below and the Second Circuit in the Local 338 case, *supra*, that certain necessary prerequisites to the application of Section 8(b)(4)(A) cannot be met when a neutral's involvement in the disputes of others is brought about through operation of the "hot cargo" clause. The facts of the present case indicate that three major elements of Section 8(b)(4)(A) application are absent:

(a) Section 8(b)(4)(A) proscribes only a strike or partial strike or other act of insubordination or refusal to perform work in the nature of a strike or partial strike as a means of causing the carriers to stop doing business with *American Iron;* that section does not proscribe *any* mere refusal to perform work which may lead to that result. It can hardly be said in the present case that a strike or partial strike took place in view of the fact that the carriers had not only consented in advance that their employees need not handle the "struck goods" but, further, had pledged that they shall not be *allowed* to handle such goods.

(b) Section 8(b)(4)(A) requires that any refusal to work shall take place in the course of the employee's employment. Since the "struck goods" agreement in the present case expressly takes the unloading of American Iron

[3] A further pertinent inquiry in this area involves the question of what happens to the Board's position in view of the recent determination of this Court in *General Electric Co.* v. *U.E.*, No. 276, decided June 3, 1957. Under that decision it would appear that since, by the Board's own pronouncement, the "hot cargo" clause is valid on its face, the union party thereto is free to invoke Section 301 of the Act in support of a decree of specific performance.

trucks out of the area of employment and removes those particular services from the scope of services which are regularly performed or which the employer could reasonably expect his employees to perform, it cannot be said that the "refusal" in the present case was made in the course of the carriers' employees' employment, so that a second element of Section 8(b)(4)(A) is not present.

(c) Section 8(b)(4)(A) requires that the proscribed activity must constitute a *forcing* of a neutral to cease doing business with some other employer, and that a specific object of the union's acts of encouragement is to obtain that result. *Cf. N.L.R.B.* v. *Denver Building & Construction Trades Council*, 341 U.S. 675, at 687. Here, however, it cannot be said that any action of the Drivers' Union *forced* the carriers to refrain from doing business with American Iron for the reason that the carriers under their "struck goods" agreement had expressly agreed so to refrain in advance.

CONCLUSION

As stated by the Second Circuit in *Rabouin* v. *N.L.R.B.*, 195 F. 2d at 912:

> ". . . in a matter of such bitter controversy as the Taft-Hartley Act, the product of careful legislative drafting and compromise beyond which its protagonists either way could not force the main body of legislators, the courts should proceed cautiously."

It is respectfully submitted that both the language and the legislative history of Section 8(b)(4)(A) of the Act support the conclusion of the court below and of the Second Circuit in the *Local 338* case, *supra*, that that section was not intended either to outlaw or limit the enforceability of the traditional "hot cargo" clause, and that the decisions of those courts should be affirmed.

Respectfully submitted,

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THE "HOT CARGO" PRINCIPLE AND TRADE UNIONISM IN THE AMERICAN COMPETITIVE ECONOMIC SYSTEM

I. The "Hot Cargo" Principle is a Necessary Instrument of Union Organization

"Hot Cargo" is a term which refers to the refusal by union members to handle non-union or struck goods or services. Such refusal constitutes a form of organized action by trade unions designed to achieve or extend union organization; to protect union standards; and to express labor solidarity.

Such organized action to achieve the same or similar ends is not confined to labor unions. It is a common characteristic of all groups subject to the uncertainties of a market economy. Thus, businessmen desire protection from foreign competition to protect their sales opportunities, while farmers demand government action to prevent the undermining of parity prices. Fundamentally, all such action is designed to achieve a greater degree of security in an economy in which the well-being of individuals and groups is subject to substantial and often unpredictable changes.

Under modern industrial conditions, unions must, in self-preservation, extend their organization throughout an industry in order to be effective. To protect and enlarge their members' job opportunities, they must standardize wages and working conditions. Such standardization—a prime objective of unions—is imperative under our competitive economic system. The "hot cargo" principle is a traditional union technique to effect organization and, thereby, standardization.

A. The "Hot Cargo" Principle Helps to Standardize Wages and Working Conditions—a Basic Union and Public Policy Objective

Our present-day scale of industrial, commercial, and transportational organization virtually makes the entire country one vast market. Industries serve national markets; firms produce for a national market, aided by our

modern transportation system and cross-hauling of products from coast to coast. These factors mean that the area of competition is enlarged, in many industries, beyond the immediate area of the firm.

Industrial organization today is no longer based on the single shop. A single employer in a particular economic field can affect the whole economic area. Especially in highly competitive industries, wages cannot be increased or even maintained, in the face of non-union, unfair competition within the industry. A single employer who refuses to abide by union conditions can, and inevitably does, threaten the standards of the union and its members. Even though non-union employers may be in the minority in any given industry, they obviously constitute pressure against both the union and responsible employers who compete on the merits of their product, not upon labor exploitation.

A modern trade union must concern itself with the many employers in the same industry whose price structure and whose competitive position in the market are dependent upon the union's ability to maintain complete or almost complete organization of an industry.

It has been the age-old aim of unions to try to stop competition between different firms and areas on the basis of wages and to take labor out of competition. Consequently union activity has been directed toward standardizing working conditions throughout an industry or area. The Webbs, in their classic work on trade unions, comment on this policy:

> "This standardization, the Device of the Common Rule, is a universal policy of trade unionism." [1]

Brooks re-states this objective as follows:

> "The basic business principle of unionism is the reversal of the process of competition by establishing a 'standard rate' or minimum wage below which employment shall not be allowed." [2]

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[1] Sidney and Beatrice Webb, *Industrial Democracy*. London: Longmans Green and Co., 1911, p. 560.

[2] Robert R. Brooks, *When Labor Organizes*. Yale University Press, 1937, p. 204.

The necessity for complete organization of the competitive market has been recognized by many labor economists and students of trade unionism:

> "When a union passes the evangelical stages and settles down, one of the most compelling motives in its organization work is to minimize wage competition in its industry. Unions naturally have a stake in keeping their organized establishments in business profitably. To the extent that this is endangered by the fact that nonunion firms paying lower wages can undersell the union firms, *there is a crucial obligation on the part of the union to organize these firms.* Sidney Hillman put the matter very succinctly when he said, 'We have always fought in the non-union markets to protect ourselves in the union markets.'"[3]
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> * * *
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> "In competitive industries it is imperative that minimum wage agreements *extend over most of the industry.* Otherwise the nonunion areas undercut the unionized sections and destroy the union."[4]
>
> * * *
>
> "Taking labor out of competition *requires the organization of employees throughout the market* in order to eliminate nonunion competition, and a policy of downward inflexibility, in order to prevent competitive wage cutting."[5]

The unions' justifiable economic interest in non-union employers competing with their own employers, is indicated by the following comment by the Amalgamated Clothing Workers:

> "Early in our history as an organization we recognized that there were definite limits upon our ability to improve and maintain the wage and hour standards of workers employed by a single manufacturer or in a single market, unless we succeeded in raising the standards of all competing manufacturers and markets up to the same level. Thus, throughout our history, we

[3] Jack Barbash, *Labor Unions in Action.* Harper & Brothers, 1948, p. 14 (Emphasis supplied.) Footnote in original deleted.

[4] Brooks, *op. cit.*, p. 205. (Emphasis supplied.)

[5] Arthur M. Ross, *Trade Union Wage Policy.* University of California Press, 1948, p. 48. (Emphasis supplied.)

have been confronted with the problem of stabilizing the clothing industry by taking measures to equalize the labor costs of competing manufacturers."[6]

Judicial notice of this fact is evidenced in the following citation:

> "[The Union is] as interested in the wages of those not members, or in the conditions under which they work as in its own members because of the influence of one upon the other. All engaged in a trade are affected by the prevailing rate of wages. All, by the principle of collective bargaining.
>
> Economic organization—today is not based on the single shop. Unions believe that wages may be increased, collective bargaining maintained only if union conditions prevail, not in some single factory but generally."[7]

By the 1920's, reports Gregory, all nationally affiliated unions were thoroughly committed to the necessity of unionizing:

> ". . . all units in every industry in which a union was already established. The reason for this position was that no union could endure competition in any national market between its own union-made goods and non-union standards, chiefly the wage differential. This economic program had become of such momentous importance to unions that it may be said to have become the very essence of American labor unionism itself. Certainly, this program went to the very heart of their organizational compaigns. They simply had to pursue it relentlessly if they were going to survive at all."[8]

This objective was to be achieved, using traditional union techniques, by extending union organization into non-union plants, trades, and establishments. Mr. Justice Stone, in speaking of this objective in the *Apex* case, stated that:

> ". . . in order to render a labor combination effective it must eliminate the competition from nonunion-made

[6] Report of the General Executive Board to the Thirteenth Biennial Convention of the Amalgamated Clothing Workers of America, 1940, p. 32. Cited in Seidman, *The Needle Trades*, p. 276.

[7] *Exchange Bakery* v. *Rifkin*, 245 N. Y. 260, 263, 157 N. E. 130.

[8] Charles O. Gregory, *Labor and the Law*, W. W. Norton and Co., Inc., New York, 1946, p. 216.

> goods . . . an elimination of price competition based on differences in labor standards is the objective of any national labor organization." [9]

One of the ways the American labor movement has sought to standardize wages and working conditions has been to press for Federal or State legislation to protect certain groups of workers or to establish minimum standards applicable to all workers. For example, under the Fair Labor Standards Act, minimum wage and hour standards have been established in much of American industry, thus moving the area of collective bargaining on these issues to higher levels.

In Western European countries collective bargaining negotiations on a national or regional level usually result in agreements *which are applicable to all workers in the industry, whether or not they are members of the bargaining unions.* In addition, a number of countries, Germany and France, for example, have provided for the formal legal "extension" of the terms of agreements to employers and workers in the industry or geographic area covered by the agreement.[10]

However, the chief method used by organized labor in this country in achieving standardization has been through collective bargaining and expanding union organization. By organizing the entire industry, and thereby standardizing employment conditions throughout the industry, the union can eliminate the competitive hazard to already established standards in existing unionized units.

Gregory sums up this basic procedure and objective as as follows:

> "It is now a commonplace to think of unionism affiliated on a nation-wide basis as a device primarily for eliminating the competition between union-made and nonunion-made goods in the same markets." [11]

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[9] *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469 at 503 (1940).

[10] Walter Galenson, ed., *Comparative Labor Movements.* Prentice-Hall, 1952; p. 307 et seq; 379 et seq.

[11] Gregory, *op. cit.*, p. 418.

Hoxie, in his classic study of American trade unions arrives at the same conclusion:

> "The principle of uniformity . . . is the central and fundamental principle of trade union policy and is absolutely essential, from the point of view of the dominant type of unionism, to its successful functioning." [12]

Unions must, by the very force of competition in our industrial society, not only try to establish and maintain but also to extend the area of uniformity of conditions, for employer and workers:

> "[The union is interested] in an area as wide as the product market in which it operates because it considers low wage areas an unfair competition. The union, therefore, presses for wage standardization. *The employers in the high-wage areas are also in favor of wage standardization because they don't wish to risk the possibility of price competition caused by differences in labor cost.* The workers in the low-wage areas are also interested in wage standardization. They don't like the idea of working at low wages on a product that sells in the market for the same price as the product of their high-wage neighbors." [13]

McCabe recognizes this principle in the following terms:

> "It is only logical that the union should be the initiator in widening the area of collective bargaining, inasmuch as the union is the initiator of collective bargaining itself. The same reasons that lead the union to attempt to establish collective bargaining in the shop usually impel it to spread the bargaining over a wider area than the single shop, to the locality at least. The desire for what the Webbs termed the 'standard rate' generally leads to standardization over an area wider than the single shop by an 'organized' local or national union.' It is not meant to imply that the area of the standard rate and the area of collective bargaining must be identical. But widening the latter is one way

[12] Robert F. Hoxie, *Trade Unionism in the United States.* D. Appleton-Century Co., 1936, p. 347.

[13] W. Ellison Chalmers and Scott MacEachron; *Master Agreements in Collective Bargaining.* Institute of Labor and Industrial Relations, University of Illinois Bulletin, Vol. 47; No. 22; November 1949, p. 8. (Emphasis supplied.)

of implementing the widening of the former as well as of the area of other elements in the terms of employment." [14]

In brief, as a matter of economic survival, unions must strive to establish uniformity of working conditions throughout the industry in which they operate. Within this basic framework, the "hot cargo" clause or principle was early adopted by American trade unions as a defensible and justifiable organizing tool.

B. History and Development of the "Hot Cargo" Principle

The refusal to handle or patronize "unfair" goods or "hot cargo" is a principle followed for centuries in all parts of the world and in all forms of social or economic relationships.[15] One need only recall in our own history the refusal by American colonists to buy British tea, the Abolitionists' refusal to buy slave-made products, the refusal to purchase Japanese silk in the 1930's, "Buy American" campaigns, etc.

The practice has been widely employed by the various groups—by the members of a national or racial group, by organized groups of consumers, by groups of businessmen, by labor organizations.

In the labor field, the refusal of union members to perform any work on non-union or struck goods or to supply goods to non-union shops is one of the most tradjtional and widespread of the tactics which labor finds essential in its efforts to maintain decent standards.[16] It has found wide

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[14] David A. McCabe, *Union Policies As to the Area of Collective Bargaining*, in *Interpreting the Labor Movement*, Industrial Relations Research Assn. 1952, p. 112.

[15] Encyclopedia of Social Sciences, *Boycott*, vol. 2, 1930, p. 662.

[16] See *Strikes and Lockouts* (Preliminary Draft) U. S. Department of Labor, Bureau of Labor Statistics, Industrial Relations Branch (Feb. 1947). Laidler, Harry W., *Boycotts and the Labor Struggle*, Part III, New York, John Lane Co., 1913; Wolman, Leo, *The Boycott in American Trade Unions*, Chapter III, Baltimore, The Johns Hopkins Press, 1916; Millis and Montgomery, *Organized Labor*, pp. 581-591, McGraw-Hill Book Co., N. Y., 1945.

acceptance by employers through the United States.[17] It has been described as "almost exclusively an American institution."[18] Union members early felt the necessity for eliminating non-union competition. They firmly believed that the collective security of the whole group, an equality of bargaining power, and an adequate share of the national income could only be obtained through establishing non-competitive markets for labor.

Instances of the refusal to work on non-union goods or materials can be found as far back as the early 1800's. Wolman's detailed study reports that:

> "The general strike of the New York cordwainers in 1809 was caused by the fact that the employers 'originally involved' had attempted to have their goods manufactured in other shops, and had, consequently, precipitated strikes among the workmen of other employers, who refused to contribute to the production of unfair goods. In 1827 the journeymen tailors of Philadelphia struck against several master tailors. When the master tailors later attempted to have their work done in other shops, the strikers succeeded in persuading the journeymen there employed to refuse to do the work while the orders of the unfair firms were being received. Within the category of boycotts on materials falls the action taken by the journeymen stone cutters of New York, when in 1830 they imposed a boycott on convict-cut stone. 'Most of the stone cutters,' they said, 'have entered into a voluntary agreement to refrain from working stone from the states' prisons, and deputations have been sent to those who continued to work such stone.'"[19]

By about 1880, the refusal to handle unfair goods was generally adopted by labor unions.[20] Among the factors responsible were: (1) solidarity within the ranks of the Knights of Labor which permitted such action to be ap-

[17] See Bureau of National Affairs, *Collective Bargaining Negotiations and Contracts*, Sec. 77, 1947.

[18] Wolman, *op. cit.*, p. 41. See also Millis & Montgomery, *op. cit.*, p. 582.

[19] Wolman, *op. cit.*, pp. 22-23. Footnotes in original deleted.

[20] Wolman, *op. cit.*, p. 24.

plied extensively and by a large group; and (2) increasing division of labor and specialization, which made replacement of striking employees with decreasing skill a simple task. Semi-skilled and unskilled workers could be hired rather easily and trained quickly. Thus, often through lack of choice, the "hot cargo" principle was brought to the front as an effective labor weapon.

Such unions as the Brewery Workmen and the Typographical Union carried on successful campaigns against non-union products and materials and thereby effected the organization of large non-union plants.[21] A large number of other unions carried on such programs—the United Hatters, Metal Polishers, Garment Workers, Carpenters, Bakers and Confectioners, Coopers, Printers, Bookbinders, —as well as the various railroad unions.

Wolman cites a "typical instance" by railroad laborers on a "fair" or union road of refusal to handle the rolling-stock of railroads that were unfair to their employees:

> "For example, the persistent opposition of the Wabash Railroad Company to the Knights of Labor caused the general executive board of the Knights to issue in 1885 an order to all members 'employed on the Union Pacific and its branches and on Gould's Southwestern system that they must refuse to handle or repair Wabash rolling stock.'" [22]

Janes describes the policy of the Locomotive Engineers as follows:

> "The policy of the railroad brotherhoods is to refuse to allow their members to take the place of a striker or to do any of the work of a striker in any strike inaugurated by any recognized labor organization. The Locomotive Engineers are instructed not to do any work which they would not do if there were no strike. If the machinists are on strike, the engineers have no right to do the machinists' work." [23]

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[21] Ibid, p. 33.

[22] Wolman, *op. cit.*, p. 59. Footnote in original deleted.

[23] George Milton Janes, *The Control of Strikes in American Trade Unions*. Johns Hopkins Press, 1916, p. 82.

Implicit in this policy is the view that handling struck work is tantamount to strike-breaking.

In 1890 the Brotherhood of Locomotive Engineers passed a resolution forbidding its members to handle property belonging to any railroad involved in a strike.[24]

Wolman also cites adoption of the principle of "hot cargo" in the building trades near the turn of the century:

> "In 1897 there was organized in Chicago a federation composed of the sash and door makers, terra cotta workers, brick-makers and others, to be known as the Building Material Trades Council. This organization was sponsored by the Chicago Building Trades Council; and it was the intention at the time that the two organizations should work in harmony, 'the material men refusing to work on material for a building upon which non-union men were engaged in constructing and the building trades refusing to handle material made in non-union establishments.'" [25]

The views and practices of building trades unions on working on non-union materials is highlighted below:

> "Most bitter controversy has been aroused by the third of the cardinal principles—'there shall be no restriction of the use of any raw or manufactured material except prison-made'—than by any of the others. So strong was the opposition to work on non-union materials that Congressman Madden was obliged to exempt cut and sawed stone, granite, exterior marble work, common brick, and wood mill-work from his proposed compromise agreement in 1900. The Sheet Metal Workers, Electrical Workers, and Fixture Hangers had a restriction against non-union materials by unwritten law for years. The great strike of 1913, which resulted in a general lockout, was brought about by the Marble Setters' violation of Cardinal Principle No. 3. The Carpenters always opposed this provision, and although they agreed to the Uniform Form in a compromise settlement of the strike in 1915, they

[24] Encyclopedia of the Social Sciences, *Boycott*, vol. 2, 1930, p. 664. Janes puts the date as 1889. George M. Janes, *op. cit.*, p. 81.

[25] Wolman, *op. cit.*, p. 69.

changed the third principle in the agreement of 1918 to read that there should be no restriction upon any materials 'except prison-made and non-union.'" [26]

And shortly after the turn of the century, in the printing trades:

"Both the Printing Pressmen and the Stereotypers have refused to handle 'strike-bound' composition. During the eight-hour strike of the Printers in 1905-1907 the Stereotypers in New York, Chicago, Cincinnati, Minneapolis, Richmond, Virginia, and other cities went out on prolonged strikes because they were asked to handle non-union matter." [27]

Wolman cites another illustration in the printing trades:

"The Allied Printing Trades Council is composed of the Typographical Union, the Printing Pressmen, the Stereotypers and Electrotypers, the Bookbinders, and the Photo-Engravers. At a conference in 1908 the effect of the council could be seen by the adoption of a resolution which recommended 'whenever practicable' the refusal by the constituent unions to use 'photo-engraved plates unless such plates were stamped with the union label of the International Photo-Engravers' Union.'" [28]

Longshoremen in 1893 adopted the following rule with respect to working on ships loaded or unloaded by non-union men:

"The Longshoremen collect a fine from an employer before they allow their members to load or unload a vessel that has been loaded or unloaded by non-unionists. This rule was adopted by the union in 1893, one year after its organization, and is still retained. In case an employer refuses to pay the fine levied against the vessel and continues to employ non-unionists to do loading and unloading, provision is made for doubling the penalty. The amount of the original fine is based

[26] Royal E. Montgomery, *Industrial Relations in the Chicago Building Trades*, University of Chicago Press (1927), pp. 81-82.

[27] Frank T. Stockton, *The Closed Shop in American Trade Unions*, Johns Hopkins Press (1911), p. 112. Footnote in original deleted.

[28] Wolman, *op. cit.*, p. 70. Footnote in original deleted.

in general upon the difference between union and non-union wages."[29]

Stockton summarizes the practices of other unions during this period with respect to non-union shops, or shops on strike, or shops regarded as "unfair" by another local of the same national union:

> "If an employer is 'scabbed' or becomes 'unfair' or has a strike called against him in one shop, it is the policy of many unions to strike all of his shops. Thus the Plasterers provide that no member of the union shall be allowed 'to work for any firm or corporation after the Executive Board has decided said firm or corporation unfair.' The general executive board of the Plumbers has power to suspend any local union which allows its members to work for an employer who has been declared 'unfair' in another local. The Molders forbid their members to work on patterns brought from a struck shop or to work for an employer who takes a contract from another employer whose shop has been struck. The Pattern Makers, the Saw Smiths, and many other unions refuse to work on jobs that come from shops where strikes are in progress.
>
> "The Musicians have a rule that when a theatre is placed upon the 'unfair' list of the union, all other theatres under the same management, wherever located, shall be declared 'unfair' by the executive board. . . . *In all unions, when an employer is on the 'unfair' list of the national organization, members of all local unions are forbidden to work for him.*"[30]

Since 1903, two unions composed the Allied Wall Paper Trades, namely, the Print Cutters and the Machine Printers and Color Mixers. Cooperation between these two unions with respect to "hot goods" is described below:

> "Even when the cutting and the printing are done in separate establishments the Machine Printers will not handle non-union 'prints,' nor will the Print Cutters cut patterns for non-union printing houses."[31]

[29] Stockton, *op. cit.*, p. 88. Footnote in original deleted.
[30] Ibid. pp. 90-91. Footnote in original deleted. Emphasis supplied.
[31] Stockton, *op. cit.*, p. 117.

The solidarity of union members with respect to unfair employers is shown in the following:

> "In the Plumbers and the Lathers a strike in any particular shop means that the employer has become unfair throughout the entire jurisdiction of the union, and no member can work for him, directly or indirectly, until the strike has been settled. Any local union of the Plumbers permitting its members to work for such an employer is liable to suspension. In the Tin Plate Workers a legalized strike in any district requires the members to stop work at the same time in any mill or works in the district belonging to the firm or corporation against which the strike has been called, and the national president is authorized after the strike has continued for seven days to extend the strike to all the works of said corporation or firm." [32]

It is significant that while bans on unfair goods had often been substituted for strikes by the Knights of Labor, they were used from the nineties on in connection with pending strikes or as a method of carrying on against a firm when a strike was unsuccessful.[33]

Many unions during this period exhorted and encouraged their members, in their official journals, not to work on unfair goods and to patronize fair employers so as to assist in the organization of non-union firms.

> "Frequent references are found throughout the journals of the International Association of Marble Workers in which the officers encourage the organization of the shopmen on the ground that 'the shopmen can help the setter, by refusing to supply the finished material to employers who employ other than members of the International Association of Marble Workers.'" [34]

At about the same time, too, several unions codified their views on unfair goods by incorporating in their constitutions a ban on unfair or struck goods:

> "On the same theory, the Granite Cutters' Union has

[32] Janes, *op. cit.*, pp. 85-86. Footnotes in original deleted.
[33] Encyclopedia of the Social Sciences, *op. cit.*, p. 664.
[34] Wolman, *op. cit.*, p. 57. Footnote in original deleted.

in its national constitution a section devoted to 'work sent elsewhere during a strike,' which states that 'when the members of a branch are on a strike or are locked-out, and where the employers send their work to another locality to be cut, no other branch should allow its members to cut such work for any employer to help out the employer where the strike or lockout is going on.'" [35]

Not only do the Granite Cutters refuse to cut or trim work which has been purchased by an employer from the stock of an "unfair" or non-union firm, but they also object to cutting granite in the rough which is to be shipped to non-union yards for completion.[36]

The 1906 convention of the International Typographical Union adopted the following constitutional provision:

> "Subordinate unions, in making contracts or wage agreements, shall insert a clause therein reserving to their members the right to refuse to execute all struck work received from or destined for unfair employers or publications."

This was amended to read (by the 1921 ITU Convention):

> ". . . to refuse to execute all work received from or destined for struck offices, unfair employers or publications."

Stockton cites actions of the Teamsters Union during this same period:

> "In one or two cases the Teamsters have refused to unload railway cars that had been loaded by non-union men in other cities. This action was taken only after the local unions where the loading had been done had appealed to other local unions to strike against handling the cars." [37]

In the mid-nineties, the American Federation of Labor in its official magazine started a "We Don't Patronize" list

[35] Wolman, *op. cit.*, p. 61. Footnote in original deleted.

[36] Stockton, *op. cit.*, p. 94.

[37] Ibid., p. 95. Footnote in original deleted.

in which it listed the names of scores of "unfair" firms and assisted in other ways the refusal to handle campaigns waged by the national and international unions.

C. The "Hot Cargo" Principle Embodies the Basic Philosophy of Unions and Expresses the Unity of Interest of Union Membership

The principle embodied in "hot cargo" represents the moral code for trade unionists; its application is the badge of labor solidarity. The right to refuse to handle unfair goods is a basic tenet of unionism. It represents devotion to a union cause, sympathy with labor interests, organizational ties. This is made eloquently clear by John Mitchell, President of the United Mine Workers in the early 1900's:

> "A wise sympathetic strike which involves no violation of contract, and is of such a nature as directly and powerfully to influence the result of the original conflict, a strike carved out, not for the immediate good of the members of the union, but for that of other workmen, emphasizes, as no other event in industrial life, the universal brotherhood and solidarity of labor. There is nothing inherently and necessarily wrong in doing for others what we would that they should do for us, and a strike is not made immoral by the fact that the strikers permit others than themselves to be the gainers thereby. It sometimes happens that the weaker organizations, composed of oppressed workmen (and the more oppressed they are, the weaker their unions are apt to be) can only secure reasonable and humane conditions by and through the assistance of workingmen in other unions." [38]

There has always been a unity of interest among workingmen and, indeed, among labor unions. It is an economic truism that unfair competition among employers based upon lower wage rates to employees tends to destroy the working conditions and wage standards of all employees.

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[38] John Mitchell, *Organized Labor*, American Book and Bible House, Philadelphia, 1903, pp. 303-305.
Cited in *Unions, Management and the Public*, E. Wight Bakke and Clark Kerr, Harcourt, Brace and Co., New York, 1948, p. 417.

It is therefore evident that the common interests of all labor justify mutual aid in the achievement of like objectives. As a result, unions long ago adopted the policy of refusing to handle the products coming from an employer with whom some other union was in controversy or of otherwise contributing their labor to his enterprise.

Referring specifically to refusal to handle non-union goods, Wolman comments:

> "--materials are often stigmatized as unfair not because union members see in their manufacture encroachments upon their own fields of labor, but because it has become a not infrequent practice for union members to refuse to work upon materials that have been manufactured by workingmen receiving low wages and working long hours in unsanitary shops. Because of sympathy aroused by a knowledge of the conditions under which such materials are produced, coupled with an appeal for aid by the aggrieved workmen, it frequently happens that the members of strong unions will reject materials to whose conditions of manufacture they could, so far as their own working conditions are concerned, afford to be totally indifferent. That these feelings of sympathy for fellow-workmen have in recent years become intensified is indicated by the gradual changes in the type of labor organization that obtains in the United States, considered with special reference to the tendencies of extensive organization and trade federation." [39]

In our system of society we are proud of the fact that workingmen can band together for the purpose of raising wage rates and are not compelled to stand helplessly by and see their living standards destroyed, or even threatened. It is no accident that we have the highest standard of living in the world. It is the result of our philosophy of free competition within the framework of certain minimum basic public rules. Among these time-honored public rules is that workers may help each other by refusing to handle the products or services of an unfair employer or one

[36] Wolman, *op. cit.*, p. 48.

against whom a sister union is striking. Thus, Senator Taft, co-author of the Taft-Hartley Act, stated two years after its passage:

> "The spirit of the Act is not intended to protect a man who . . . is cooperating with a primary employer and taking his work and doing the work which he is unable to do because of the strike."[40]

The purpose of union members refusing to handle non-union or unfair materials is obviously to aid their fellow members in winning a dispute. One of the purposes of collective bargaining and self-organization, according to the Taft-Hartley Act, is "mutual aid or protection." The workers engaged in the dispute at its origin and those who refuse to work on non-union materials while the dispute continues are members of the same union. They do the same kind of work. Is there a sufficient community of interest between the two groups to justify the refusal to handle the unfair goods?

Edward Berman answers in the affirmative:

> "If either group were left unorganized the other group would be weakened, since it would be in constant danger of being underbid by unorganized workers seeking and capable of filling jobs in its own industry. Hence the efforts of the national union to organize both groups. . . . Hence also the readiness of one group to protect the wages and the bargaining power of the others. In view of the foregoing considerations one is led to the conclusion that the refusal of a skilled group to work upon materials made by non-union workers who possess the same type of skill is a justifiable attempt to protect their own interests and those of their fellow members."[41]

The doctrine of mutual aid, through refusal to handle goods of an unfair employer is, of course, most applicable when the workers of locals involved belong to the same national union and are in the same industry. In such event,

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[40] 95 Cong. Rec. (1949), p. 8709.

[41] Edward Berman, *Labor and the Sherman Act*, Harper and Brothers, New York, 1930, p. 256.

the interest and joint concern over the standardization and maintenance of employment standards among all competing employers is the more intense. In 1911, Professor Stockton described this concept in the following terms:

> "The idea that the interests of all local unions are the same has been much promoted by the increasing power of the national unions. *That strong local unions should aid weak ones is fundamental in the most highly developed American unions.*" [42]

Professor Gregory sympathetically describes the mutual aid doctrine of "hot cargo" in these terms:

> "A somewhat similar situation might occur when a large non-union printing establishment which, in the opinion of the pressmen's union, has jeopardized the position and security of the union throughout the printing industry, seeks the aid of unionized competitors in getting out weekly and monthly periodicals during rush seasons. If the union ordered its members in these other shops not to work on any of the non-union company's jobs, their refusal to do so would no doubt cause a good deal of damage. But this pressure would seem quite justifiable under the circumstances in view of the union's interest in stabilizing employment standards throughout the industry and by unionizing the publishing house in question. Certainly it could justify its conduct as a refusal to help that company which presents to it the most serious economic threat to its standards in other plants in the industry." [43]

In the same vein, Justice Holmes declared:

> "Union organization is part of the struggle for life and the losses to employers and other employees are costs of freedom and competition." [44]

Our courts have recognized the community of interest of unions (and employers) in fair standards equally applicable to all in the same line of business. Chief Justice

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[42] Frank T. Stockton, *The Closed Shop in American Trade Unions*, The Johns Hopkins Press (1911) p. 97. Emphasis supplied.

[43] Gregory, *op. cit.*, pp. 126-127.

[44] Vegelahn v. Guntner, 162 Mass 92, 44 N. E. 1077 (dissenting opinion).

Taft in *American Foundries v. Tri-City Council*, in speaking of labor union organization for the purpose of mutual help, said:

> "To render this combination at all effective, employees must make their combinations extend beyond one shop."

In the Apex case the Supreme Court declared:

> "An elimination of competition based on differences in labor standards is the objective of any national labor organization."

And in the Swing case the entire Court agreed that—

> "Interdependence of economic interests of all engaged in the same industry has become a commonplace." (312 U.S., at 326)

The doctrine of mutual aid embodied in the refusal to handle unfair goods is highlighted in this brief account:

> "Although there was much bitterness between the railroad engineers and the trainmen, on the one side, and the rest of the railroad unions, on the other side, the nonstriking unions honored the 1946 strike of engineers and trainmen and refused to man the emergency trains operated by railroad executives."[45]

Even newly organized so-called white-collar workers quickly accept the principle of mutual aid. Barbash reports that the newly organized telephone operators in Washington, D. C. refused to handle incoming or outgoing calls, "hot messages," from the strike-bound hotels in that city.[46]

During the organizational campaign directed at the Donnelly Printing Company in Chicago, which culminated in a strike, the printing trades unions all over the country conducted over a period of weeks what they called a "struck work" embargo to ensure that the company could not effectively farm out its work.[47]

Professor Haber, in his pioneering work on the building

[45] Barbash, *op. cit.*, p. 129.
[46] Ibid.
[47] *American Photo Engraver*, September 1945, pp. 812ff.; 833ff.

trades, discusses in detail the building-trade unions' rules prohibiting their members from working on materials manufactured under nonunion conditions. He concludes:

> "Union rules must be judged by some definite standard. To distinguish between rules which are regulatory and those which are restrictive implies the setting up of some standard of judgment—in short, an evaluation of the purposes of these rules. If one accepts unit costs to consumers as the dominant consideration, obviously his reaction to the union working rules will be different *than if he considers the protection of the workers' jobs and standards as the most important purpose.* Whichever standard one adopts, when one considers the economics of the building industry and its business and technical structure, *working rules are seen to be methods for justifiable protection of the workers mode of life and the bargaining power of his organization.* A vast majority of them are devices carrying into practice the things which the union is organized to defend." [48]

Unions contend that union members who are compelled to handle struck goods, or goods from a plant on an "unfair list", are acting as scabs and strikebreakers as surely as if they were going through a picket line; they become involuntary allies of the unfair employer in fighting their brother trade unionists. The union has a right to carry on such mutual-aid activities as will enable it to enlist the assistance of nonstriking union members to protect the standards of their fellow unionists. Indeed, unions argue, their members who refuse to handle the struck work or who refuse to work with nonunionists have a direct personal stake, since the maintenance of union conditions is indivisible; union conditions in one plant depend on the maintenance of union conditions in every other plant.

The employer who is engaged in a dispute with a union is perfectly free to ship his goods from the strike-bound

[48] William Haber, *Industrial Relations in the Building Industry.* Harvard University Press, (1930) p. 236. Emphasis supplied.

plant to another plant, the union people argue. Why shouldn't the union be equally free to try to persuade the employees in the other plant not to work on the struck goods?

By providing an outlet for the product of the unfair employer, or by otherwise handling it, such an employer inescapably becomes an ally of the employer engaged in a labor dispute and enables the latter to maintain the working conditions against which labor is protesting.

Here there is no "conscription of neutrals", so to speak. The members of the local union involved have a direct, definite, and recognizable economic interest at stake in the working and employment conditions prevailing at the unfair firm. By refusing to handle the goods of the nonunion firm, they are promoting economic interests of their own.

II. The "Hot Cargo" Principle is Consistent with Promotion of an Adequate Transportation System in Accordance with the National Transportation Policy

The national transportation policy as enunciated by the Congress of the United States in the Interstate Commerce Act states:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as . . . to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation. . . . and to encourage fair wages and equitable working conditions . . ."[49]

The "hot cargo" clause contributes to the development of an adequate transportation system and its maintenance by localizing strikes and labor disturbances in the transportation industry. The "hot cargo" clause localizes a labor dispute by limiting the employer's ability to conscript neutrals.

[49] 49 U.S.C., Preceding paragraph 1, 301, 901, & 1001; September 18, 1940.

to haul his freight by the device of farming out his work. It prevents a strike that is taking place in one locality from spreading and becoming a strike in the entire motor freight transportation industry.

By means of a "hot cargo" clause voluntarily agreed to by motor carriers and their employees, union members may refuse to handle unfair products of a struck employer and thus not become "scabs" or strikebreakers, in keeping with traditional union practices.

The only available recourse other than to aid in strikebreaking is to strike and this would spread from one carrier to the next and possibly throughout an entire area. This necessarily follows because no self-respecting union man can be expected to "scab" on fellow unionists, nor to aid and abet strikebreaking by passing union picket lines and handling unfair goods, or by entering a strike-bound plant.

> "There are certain basic tenets of unionism, a knowledge of which can be reasonably charged to all employers. As pointed out by counsel for the union at the hearing, one of the cardinal principles of unionism is that a union will not permit itself to be used as a means of breaking the strength of another union which at the time is out on strike.
>
> "The 'sanctity of picket lines' is basic in the teaching and practices of American unionism." [50]

To the same effect, the National Labor Relations Board states:

> "It is almost a rule of trade union ethics for one labor union to respect a picket line established by another. Even unions affiliated with rival national labor organizations not infrequently adhere to this rule." [51]

Through the "hot cargo" clause, a carrier who is not involved in a labor dispute may insulate himself against

[50] Wayne L. Morse, Arbitrator—Encinal Terminal Case. Award of March 2, 1939. 4 LRR Man 1117.

[51] L. A. Young Spring & Wire Co., 70 NLRB 868 (1946).

involvement in some other carrier's labor dispute, thus expediting the prompt and efficient delivery of freight. In this manner, the "hot cargo" clause assists the Interstate Commerce Commission in fulfilling its responsibility to promote "efficient service" and to assure that the national transportation system does not break down.

The public suffers less injury through the use of "hot cargo" clauses than from a legally sanctioned strike.

All strikes involve economic losses. They are costly to all groups in the community. A strike results in a complete shut-down. As a result, there is a total economic loss caused by non-production. *A strike and its attendant losses radiate widely through our economy.*

Refusal to handle unfair goods, on the other hand, is directed solely against an individual employer, and then only with respect to the particular unfair product or service. The only requirement is that the "neutral" employer cease handling products of employers engaged in the primary labor dispute. The "neutral" employer is otherwise fully free to pursue normal business practices and continue doing business with any firm other than the one involved in the labor dispute.

If "hot cargo" clauses are banned or made ineffective or inoperative, both unions, employers, and the public would be placed at a disadvantage, since strikes would become necessary. "Hot cargo" clauses, therefore, tend to limit the use of strikes and eliminate the necessity of striking all employers. In this respect, they are "a substitute for the strike."[52]

It can therefore be seen that the impact of a strike on "efficient service" and "sound economic conditions in transportation"—essential components of "the national transportation policy of the Congress"—is much more severe and injurious than the use of "hot cargo" clauses. When

[52] Encyclopedia of the Social Sciences—*Boycott*, vol. 2, 1930, p. 663.

these objectives are added to another tenet of Congress' national transportation policy, namely, "to encourage fair wages and equitable working conditions" the use of "hot cargo" clauses becomes the more understandable and supportable.

Congress has been made aware of "hot cargo" clauses but has refused to legislate against them. As recently as 1954, Congress had before it a bill (S. 2989) designed explicitly and specifically to outlaw "hot cargo" clauses. The bill was discussed on the floor of the Senate, but was tabled without further action, thereby leaving them within the scope of protected activity.[53]

In conclusion, therefore, "hot cargo" clauses do not impede the Interstate Commerce Commission in its function of assuring minimum disruption to our national transportation system; they are consistent with Congress' statement of transportation policy, and to a far greater extent than strikes, they support the Interstate Commerce Act's declaration of policy on avoiding interruption of employment.[54]

III. Modification or Nullification of "Hot Cargo" Clauses Would be Injurious to Unions, Fair Employers, and the Public

The well-being of society in general depends upon the economic conditions and purchasing power of workers. If this is true, then labor must be permitted to use every available legal weapon to insure success, especially for purposes of organization. And as has been shown, the "hot cargo" clause is essentially an organizational device.

To nullify the peaceful use of the "hot cargo" clause, voluntarily agreed to by employers, deprives organized labor of a human right guaranteed by the federal constitution as well as by many of the state constitutions.

If employers are permitted the lockout weapon, labor

[53] Congressional Record, May 6, 1954, p. 5792.
[54] U. S. Code, title 49, preamble to paragraph 201.

is in need of equally strong counter-tactics such as the "hot cargo" clause.

It is often impractical or impossible to establish decent work standards save by pressure brought to bear upon those who deal with or take over the work of an unfair employer. Many of the so-called neutral or secondary employers are directly interested in a labor dispute by accepting work during a strike from a struck employer. When such action occurs, the "neutral" employer directly aids the primary offender to defeat the union and hence ceases to be a disinterested party.

Unionism, as an institution designed to achieve and maintain higher than open market standards of employment, cannot exist as long as competing non-union labor remains available. The refusal to handle unfair goods, therefore, becomes necessary against employers who operate under sweatshop conditions, selling upon a competitive market with other employers whose employees have been organized.

A. The "Hot Cargo" Principle Helps Strengthen Unionism and Collective Bargaining

No extensive documentation is required to demonstrate that public policy approves and encourages collective bargaining; that unionism and collective bargaining are socially desirable. The concluding paragraph of the findings and policies of the Labor Management Relations Act, 1947, reads:

> "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and

conditions of their employment *or other mutual aid or protection.*" [55]
(Title I, Sec. 101, Sec. 1)

Although the Act does not directly encourage organization of employees, such encouragement is the end result. And in this country, employee organization and collective bargaining operate through trade unions.

As a necessary corollary to the development of collective bargaining, unionism must be given an adequate opportunity to spread to non-unionized firms, industries and geographic areas if the process of industrial self-regulation is to spread.

The business of a trade union is to protect the living standards of its members. In a market economy where competition prevails, this means that the union must make perpetual war on the tendency to treat labor as a commodity, that is, to pay it a price determined solely by the law of supply and demand. Only by controlling all the jobs in an industry and achieving uniform wages, hours and working conditions can it remove labor from competition.

Unless local unions of a national union band together to protect the standards they have separately established, they are exposed to the unregulated force of competition and are eventually destroyed:

> "Local unions checked the degradation of their members and won minor concessions; but they were ineffective in bringing about major reform. It was not the hard hearts of employers that proved the chief obstacle, but the nationalization of the market meant that owners had to manufacture as cheaply as their competitors in order to survive. The amount a successful employer could pay his workers was largely determined by the wage paid by the cheapest producer in the industry." [56]

A union cannot survive by organizing an isolated mem-

[55] Emphasis supplied.
[56] Jonathan Philip Grossman, *William Sylvis, Pioneer of American Labor*, Columbia University Press, 1945, p. 26.

ber here and another somewhere else. Its survival is largely dependent upon its control of the market. If non-union establishments are permitted to flourish, union establishments normally cannot meet market competition. The classic example is the old case of *Duplex* v. *Deering* (254 US 443).

If collective bargaining is desirable and strikes are reasonable means of securing and defending it, so also is the allied principle of refusing to work on unfair goods. "Hot Cargo" clauses are one of the decisive weapons which unions utilize (or hold in reserve) to give meaning to collective bargaining.

If employers are justified in refusing to deal with unions and pay union wages, union members are justified in refusing to work on or handle goods produced or transported against their own interests. Using the *Bedford Cut Stone* case as illustration, Berman stresses the touchstone of collective bargaining as a matter of social policy:

> "Even if one assumes that the contractors were injured by the refusal of the stone cutters to install non-union stone, it still seems reasonable to conclude that collective bargaining was sufficiently important socially to justify the imposition of such an accidental injury."[57]

Within the framework of our national labor policy which supports the principle of collective bargaining, Witney spells out the following conditions which warrant use of the "Hot Cargo" technique:[58] (1) "To advance or to protect the economic welfare of union members," for example, "if employers are . . . free to subcontract struck work." (2) To aid employees "in the winning of strikes carried out for lawful objectives. Any other policy guarantees to employers the right to operate struck facilities without fear of peaceful economic reprisal." (3) To eliminate non-union competition. "In a highly interdependent and competitive

[57] Berman, *op. cit.* p. 258.
[58] Witney, *op. cit.* pp. 445-446.

economy, union standards are threatened by the existence of non-union firms. Employers of organized firms just as union members are benefitted by the organization of non-union firms. Non-union employers should not be protected from organization by government fiat."

Organization of the unorganized worker has been a prime objective of "hot cargo" clauses. This is recognized by Wolman, who writes that "When, therefore, the ordinary methods of organization have failed, or are at the outset seen to be inoperative, the union must devise a supplementary resource", which is the refusal to handle "the products of unfair firms."[59]

Professor Gregory also characterizes the "hot cargo" principle as "essentially an organizational device."[60]

Use of the "hot cargo" principle is valid even with respect to establishments where the union has no members, according to Gregory, because the union has a real economic interest in organizing such an enterprise:

> "For all units in a particular industry are presumably competing with each other and selling their goods in the same markets. And assuming that employment standards are higher and constitute a larger portion of overhead costs in the unionized, as against the non-union, units in the industry, then it becomes apparent that all non-union units have a competitive advantage over the unionized units, due to the wage and other labor standards differentials existing between them. Under such competitive conditions, the non-union units may in time dominate the market for the industry's products by underselling the organized units. This, of course, would hurt the unionized employers. Moreover, it would adversely affect the organized workers, since it is plain that a union can thrive in a competitive industry only if the units within which it is established also prosper."

[59] Wolman, *op. cit.*, p. 18.

[60] Gregory, *op. cit.*, p. 124.

B. The "Hot Cargo" Principle Eliminates Unfair and Injurious Competition within the Trucking and Other Industries and is Accepted by Employers

A union which, through peaceful means, achieves extensive unionization and secures uniformity of conditions protects fairminded employers from "cut-throat competition." If an industry is thoroughly unionized, every employer can tell precisely what his competitors are paying in wages. The same shop rules also apply in all union establishments. Uniformity in competitive conditions is secured.

On the other hand, partly organized industries result in shocking waste and hardship to employers. Even the aggressive, honest, and efficient employer in a partially organized industry, if unionized, may well face disaster in competing with non-union employers.

Those employers who are placed at a competitive disadvantage inevitably try to equalize their wages and working conditions with those of their competitors. The impact on industrial peace and on decent and humane standards of work needs no detailed exposition.

Uniform working conditions protect one employer against another, protect the fair employer from the chiseler, and above all, assure stability of industrial operations, so far as wage costs are concerned. The fair and efficient employer is thus enabled to use all his organizing ingenuity in the layout of his plant, in the equipment and machinery used, in the purchase and selection of raw materials, in financial management, in the selection and utilization of his labor force, and in the sale of his product, and to take the risk of profit or loss based on his own ability without being burdened by unfair competition by employers who pay less-than-standard wages. This is of fundamental importance to most employers.

The only weapon against cut-throat wage competition and break-down of standards is union organization. This

is specifically recognized in our basic labor relations statutes. The Labor-Management Relations Act of 1947, in Section 101, Findings and Policies, states that the lack of organization among the workers to maintain an equality in bargaining power impairs interstate commerce "by preventing the stabilization of competitive wage rates and working conditions within and between industries." Similarly, the New York State Labor Relations Act of 1937, asserts that denial to the workers of the right to organize and bargain collectively "creates variations and instability in competitive wage rates and working conditions within and between industries."

The only way to make unions effective and to promote industrial stability is to extend unionization to as many employers and employees as possible, and over as wide an area as possible. Particularly in industries with many small firms, and where wages comprise a substantial proportion of the sales or revenue dollar, stabilization and fair wage competition will not take place unless the industry is virtually completely organized. Refusal to handle unfair goods, through "hot cargo" clauses, is one way of achieving such organization:

Employers *do* have an interest in standardization of wages and conditions of work and therefore, the unionization of their competitors.

> "An employer's competitive position in his industry is naturally affected by differences between the terms of his collective bargaining contract and the conditions of work maintained by his competitors, whether under contract or not." [61]

The factor of competition in the product market is recognized by labor arbitrators in adjudicating wage cases:

> "The American economy once again has become competitive. . . . Now it is of crucial importance to such a

[61] U. S. Department of Labor, Bureau of Labor Statistics, *Collective Bargaining Provisions: Preamble, Scope of Bargaining Unit, Duration of Agreements*, Bulletin 908-19, p. 22.

> firm that it be able to maintain at least a rough equivalence of labor and other costs with its competitors. In default of maintenance of such an equivalence, its markets, and the jobs of its workers, will be in jeopardy." [62]

Note also the following illuminating comment:

> "Even when the economic reason for organizing competitive firms is not very apparent, union negotiators find themselves in a difficult psychological bargaining position with unionized employers who tax the union with its inability to impose union conditions over the whole industry." [63]

As a result, unions are often required to pledge contractually to obtain uniform wages and working conditions throughout the industry or area.[64] An illustration from the printing industry is cited below:

> "Throughout the entire period 1899-1939, the pressures arising from the growth of an intercity market in book and job printing have exerted themselves in many corners of the field. Consequently, a literature of employers' protests has grown up, centering about the labor cost factor which bulks large in commercial printing. The demand is voiced that the variations in wages, hours, and working conditions in competitive areas be made more uniform. The Syracuse Agreement of 1898 entered into by the United Typothetae of America and the I.T.U., International Printing Pressmen and Assistants' Union, and International Brotherhood of Bookbinders, *provided that the signatory international unions would seek to equalize union rates in competitive markets* in return for a reduction in hours in the shops of the master printers." [65]

Actually, some employers in highly competitive industries have welcomed unionization of the entire industry. Cut-throat competition is always undesirable to employers

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[62] Champion Aero Metal Products and United Electrical Workers, 7 LA 283 (1947). See also Heywood Narrow Fabrics and Textile Workers, 6 LA 14 (1946).

[63] Barbash, *op. cit.*, p. 16.

[64] Bulletin 908-19, *op. cit.*, pp. 22-23.

[65] Jacob Loft, *The Printing Trades*, Farrar and Rinehart, Inc., 1944, pp. 10-11. Footnote in original deleted. Emphasis supplied.

and the union can aid in stabilizing the industry and policing it. Employers are willing to assist the union in this role. For example, in the Central Competitive Field Agreement of 1898 in the bituminous coal industry,

> "The union agreed to give employers who were members of the Agreement all possible protection 'against unfair competition resulting from a failure to maintain scale rates' of the wages agreed upon. In order to enable the union financially to apply the strike weapon against operators who refused to pay the wage scales, the employers undertook to deduct union dues from wages if authorized to do so by individual miners." [66]

Another illustration of employer assistance to unions' efforts to extend unionization dates from the early 1900's. The National Civic Federation, an employers' association which functioned in the early 1900's extended aid to unions by inducing employers and employers' associations to negotiate with trade unions.[67]

Whether or not the pledge to secure uniform standards is explicitly spelled out in a contract, this is a basic union objective which union employers view sympathetically. Employers have sound economic motivations for agreeing to "hot cargo" clauses—they wish to minimize competition from non-union firms:

> "One could almost say that an employer in a stable or contracting industry with highly fluctuating profits has mainly two concerns in the field of labor relations: (1) to save his plant from Unionization, or (2) if he has failed to do so, to see that the plants of his competitors are also unionized. In such indusfries employers have often been forced to abandon desirable personnel policies with regard to wages and working conditions simply under competitive pressure. In good times they have been reluctant to grant wage increases because

[66] Otto Pollak, *Social Implications of Industry-Wide Bargaining*, University of Pennsylvania Press, 1948, p. 9. Footnotes in original deleted.

[67] *Employers' Associations.* In Encyclopedia of the Social Sciences, The MacMillan Company, 1931, vol. V, p. 511.

> they feared that competitors would not do likewise and thereby gain a competitive advantage. In bad times employers have been forced to reduce wages to the level of their weakest competitors in order to retain their competitive position. *In the 1930's employers actually emphasized the need for industry-wide wage policies in order to provide insurance against competitive upsets.*" [68]

George Taylor also refers to employers' cooperation with unions in achieving standardized conditions within the industry:

> "Acceptance of collective bargaining by an employer means in these terms that management is willing to 'go along' and cooperate with the union in developing union security and standardized conditions of employment within a plant *and between competing plants.*" [69]

During World War II, the New York Regional War Labor Board (Regional Board II) recommended in a dispute case, that the parties include the following "Hot Cargo" clause *proposed by the company:*

> "The Company shall not cause the employees to work on rubber and paracord products which may be sent to the factories from another rubber plant where the employees have been organized by the USWA and where a strike exists, provided notice of such strike is given to the employer by the union by registered mail, postage prepaid." [70]

The union in this case had proposed a provision which would permit the employees to decline to work on any product received from or going to an employer whose employees are on strike.

The only protection afforded the employer who pays union wages against sweatshops or underpaid labor com-

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[68] Pollak, *op. cit.*, pp. 7-8. Footnotes in original deleted. Emphasis supplied.

[69] George W. Taylor, *Governmental Regulation of Industrial Relations*, 1948, p. 63. Emphasis supplied.

[70] In re *Endicott Johnson Corporation* and *United Shoe Workers of America, Local 83 (CIO)*, Case No. 111-12557-D, May 1, 1945. Bureau of National Affairs, 24 War Labor Reports 332.

petition has been the power of the union to refuse to handle goods produced by such substandard labor. The "hot cargo" technique gives a measure of protection to the *employer* of union labor, as well as to the wage standards of his employees.

The union employer and employees have no legal protection other than this organized resistance. If the low-wage employer is protected against such union action, the end result is inevitable. The employer who pays higher wages cannot possibly survive if his product reaches a market in competition with a competing product produced at a substandard wage. This is not theory. It is industrial history and economic fact. We are all familiar with the "runaway shop."

Inability to apply "hot cargo" clauses negates effective union resistance to unfair standards. Thus, for the benefit of the non-union and low wage employer, fair employers and union workers are disadvantaged. The result of such competition is ruination of wages and living standards for both groups of workers.

Fair employers understand and recognize this state of affairs. For example, in the fall of 1912 a protocol was tentatively negotiated with an association of employers controlling one-fourth of the New York dress and waist trade, *upon condition that the majority of the industry be organized.* In the meantime agitation for a general strike was kept up among the workers. The members of the association not unnaturally wanted the standards of their competitors raised along with their own, *and agreed to have their shops included in the strike,* with an understanding that their workers would return to their jobs as soon as the agreement was signed. The strike was called January 15, 1913, a protocol was signed three days later, and on the 20th, the workers in the association shops were sent back to work.[71]

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[71] Joel Seidman, *The Needle Trades,* Farrar & Rinehart, Inc., New York, 1942, p. 110.

This incident reveals clearly the direct interest of organized employers in the extent of unionization in their industry and their assistance to unions in furthering organization.

This also explains why some unionized employers have actively supported the principle of higher statutory minimum wages. For example, at the 1947 Congressional hearings on increasing the minimum wage, various industry spokesmen, representing unionized firms, testified in support of a higher minimum. Among the reasons cited were that non-union competitors would be most affected by a higher minimum, which was already being paid in union plants;[72] that "it would help stabilize the industry";[73] and that minimum uniform standards—in this case achieved through a statutory minimum wage—act as a constructive, stabilizing force in the industry, primarily because they "*prevented disemployment among the more progressive segments of business, those segments determined to pay decent wages.*"[74]

The following discussion emphasizes fair industry's concern with unfair competition:

> "Mr. (Cong.) Fisher: You frankly put it, to some extent, at least, on the basis of relieving some of the hardships or disadvantages that may result in competition.
>
> "Mr. Rabbino: What I consider unfair competition; yes."[75]

I have referred to the employer's interest in wage equality with his competitors and to his concern with their unionization. The classic case of *Duplex Printing* v. *Deering* involved this situation: Of the four printing-press manu-

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[72] *Minimum Wage Standards*, Hearings before Subcommittee No. 4 of the Committee on Education & Labor, House of Representatives, 80th Congress, 1st session on H.R. 40, et al., vol. 1, pp. 608; 624-625.

[73] Ibid., vol. 3, pp. 1644, 1650.

[74] Ibid., p. 1659. Emphasis supplied.

[75] Ibid., p. 1662. See also discussion by Patrick W. McDonough, President, McDonough Steel Co., Oakland, Calif., p. 1627, et seq.

facturers in the country, three were union and one was unorganized. When the contracts with the three organized employers expired, the union was informed that their employers would prefer to maintain union standards but could not do so in the face of the competition of the fourth, the unfair employer. Thus, in order to preserve the gains they had made, the union called upon its fellow members in New York and elsewhere not to install or work on the unfair printing presses.

A Supreme Court majority found such action to be an unlawful boycott. However, Justices Brandeis and Holmes spoke out in sharp and compellingly persuasive dissent (254 U. S. 443, 481, 482). They said:

> "May not all with a common interest join in refusing to expend their labor upon articles whose very production constitutes an attack upon their standard of living and the institution which they are convinced supports it? . . . Courts, with better appreciation of the facts of industry, recognized the unity of interest throughout the union, and that, in refusing to work on materials which threatened it, the union was only refusing to aid in destroying itself."

Stabilization in the Trucking Industry by the Teamsters' Union

With respect to the trucking industry, the competitive structure of the industry calls for standardization through unionization. Without the union, cut-throat methods prevail. Employers are so numerous and have such diverse interests that they have not been able to form a single trade or employers' association covering the whole industry. Competition, unless restrained and regulated, would lead to wage- and rate-cutting. Consequently they have been unable to "stabilize" the industry without the assistance of the Teamsters.

The "legitimate" unionized trucker, whose employment conditions are fair, is constantly endangered by the opera-

tions of his non-union competitors. What can he do about it? The union comes to his rescue by enforcing uniform conditions on all employers, big and small, fair and unfair, efficient and inefficient. The wage scale, working conditions, overtime regulations, and other rules which enter into the employment problem are enforced equally upon all.

Widespread unionization through the Teamsters Union over the area of competition raises the plane of competition by standardizing those elements which make up the money cost of labor.

The Teamsters' collective bargaining policy, in terms of objectives, principles, and methods, is designed to be uniform for the "industry" as a whole:

> "Bargaining in the trucking industry is not a union monopoly, in the sense of a device to restrict the labor supply or drive up the price of labor, or a two-sided monopoly, in the sense of a mutual device to limit employment and output and push up wages and prices at the expense of the consuming public. It is, however, conducted with a view to taking labor costs 'out of competition,' i.e., to achieving uniformity in the direct labor costs of competing firms." [76]

An astute observer notes that one force pervades collective bargaining relationships in the trucking industry; namely:

> "The pressure for establishment of uniform wages and conditions of employment." [77]

The International Brotherhood of Teamsters has provided such a stabilizing force, only because it is extending unionization throughout the industry. The president of the association of local truck operators throughout the United States comments:

> "No other single element or combination or association exerts such influence toward stability in our industry." [78]

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[76] Feinsinger, *op. cit.*, p. 38.

[77] George W. Taylor in Preface to Nathan L. Feinsinger, *Collective Bargaining in the Trucking Industry*, University of Pennsylvania Press, 1949, p. iii.

[78] Quoted in Feinsinger, *op. cit.*, p. 36.

Similar testimony is reported by *Newsweek*, which states that the Teamsters' Union "has brought stability to the industry." [79]

Only by using such tools as the "hot cargo" clause has the union been able to carry out its function of promoting "fair industry practices and rules which no other instrumentality in the field has been able to accomplish." [80]

This conclusion is also the view of the author of the only study dealing at any length or in any depth with the problems of collective bargaining in the trucking industry:

> "In conclusion, it must be said that the union has done an efficient job of organizing the employees of this industry and has succeeded in materially increasing their wages and improving their conditions of labor. There was great need for a union in this industry, because prior to the formation of the union, intense competition had forced wages to a low level and hours of labor to excessive lengths. Conditions of labor were also bad. It is probable that the employees of this industry, characterized as it is by severe competition and small use of capital, will always need a union to protect the standards of wages and working conditions which they possess at the present time. If the industry develops into one composed of a few large units, the need for a union may not be so great, because competition would probably be less keen, but the need would nevertheless exist for some organization to represent employees in negotiations with employers. If such an organization did not exist, it is probable that, even with only a few large-scale enterprises, wages would tend to decline, hours would increase, and working conditions would become less favorable.
>
> "*Employers will find it to their advantage to continue to have a union, because it is the only way in which employers can eliminate as an item of competition, the large part of total cost composed of labor cost.* It is probable that the employers will also find it true that unionism will lead to better relations with

[79] *Newsweek*, May 14, 1956, p. 33.
[80] Feinsinger, *op. cit.*, p. 36.

employees and that it is a method of maintaining employee morale which cannot be duplicated by any other device."[81]

Because of the nature of the trucking industry, the Teamsters' Union has a special problem in organizing which makes use of the "hot cargo" technique imperative. Users of trucking services rarely come to the truck terminal for purpose of employing the trucker's services. Rather, the trucks must go to the premises of the customer in order to pick up or deliver merchandise. Practically, then, economic pressure can be effectively applied against an unfair or non-union trucker only at the point where the business is actually done, namely, where a pickup or delivery is made. It is there that the Teamster member or local union must appeal for the aid and assistance of fellow workingmen. And this is why it was necessary to develop and apply the "hot cargo" clause for the trucking industry.

Again, since one truck line often interlines with another whose terminals may be far distant, the only practical method of using economic pressure, other than picketing, is through the use of the "hot cargo" clause.

Because Teamsters include dock workers as well as drivers, its members daily come into contact with non-union drivers (or dockmen) who jeopardize their own security and that of the fair firm by whom they are employed. Even though open warfare does not occur, the inherent antagonism between the two groups, union and non-union, causes constant friction, bringing about lowered morale, increased cost and much industrial unrest. Small wonder, then, that many unionized firms dealing with the Teamsters Union voluntarily agree to "Hot Cargo" clauses to minimize such unrest.

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[81] Samuel E. Hill, *Teamsters and Transportation, Employee-Employer Relationships in New England.* American Council on Public Affairs 1942, p. 235. Emphasis supplied.

IV. The "Hot Cargo" Principle is Recognized Extensively Throughout American Industry

The refusal of union men to work on non-union materials or on materials handled by non-union workmen has been observed down to the present day—as a matter of basic union principle often incorporated in union constitutions and by-laws; as a matter of practice; and as a right incorporated in the form of "hot cargo" clauses in collective bargaining contracts.

"Hot cargo" clauses are widespread. They occur in a large variety of industries; they are negotiated by many unions, craft and industrial, those covering manual workers as well as those covering office, technical and professional employees. They are found in manufacturing, non-manufacturing, transportation, communication, technical laboratories, etc.

The Bureau of Labor Statistics has, for many years, analyzed union contracts in a variety of indusfries or reprinted copies or extracts of such agreements. In the period 1923-1927, the Bureau published four bulletins on "Trade Agreements" (Bulletins 393, 419, 448, and 468) in which it discussed the terms and provisions of collective bargaining contracts current at that time and reproduced many contracts, in whole or in part.

The agreements included many references to unfair, non-union or struck goods clauses. In its subject index to the four bulletins, the Bureau classified such clauses in the categories shown in the table below, which also lists the number of clauses included in each category:

Number of References to Unfair, Non-union or Struck Goods Clauses in Collective Bargaining Contracts, 1923-1927 [82]

[82] "Trade Agreements, 1927", Bulletin No. 468, Bureau of Labor Statistics, U. S. Department of Labor, (December, 1928). Cumulative Index to Trade Agreements, Subject Index, pp. 218-237.

Type of Provision	*Number of Clauses*
Non-union goods not to be used	7
Furnishing goods to a struck shop	20
Refusal to execute struck work	18
Unfair firms, goods, and jobs	14
Union-made materials: Use required	7

The text of these provisions is to be found in Appendix A. The unions represented in this group include the Meat Cutters, Bakers, Stone Cutters, Laundry Workers, Sheet-Metal Workers, Granite Cutters, Plasterers and Cement Finishers, United Cloth Hat and Cap Makers, Ladies' Garment Workers, Amalgamated Clothing Workers, Bookbinders and Bindery Women, Paper Cutters, Machinists, Fur Workers, Pocketbook Workers, Typographical Union, Printing Pressmen, Stereotypers and Electrotypers, Teamsters, Photo-Engravers, Street and Electric Railway Employees, Pressmen's Union, Lithographers, Brewery Workers, Carpenters, Painters, Hotel and Restaurant Employees, Cleaners, Dyers and Pressers, Broom and Whisk Makers, Paving Cutters, and United Wall Paper Crafts.

The type and extent of "hot cargo" clauses in agreements in 10 industries studied by the Bureau of Labor Statistics from 1935 to 1945 is shown below. The industries are baking, building trades, brewery, electrical equipment and radio manufacturing, shoe, rubber, newspaper publishing, shipbuilding, leather tanning, and tobacco.

(Based on analysis of 175 Bakery agreements in files of Bureau of Labor Statistics)

> "Eight agreements provide that the employer shall not ask any union man to cross a picket line, and a considerable number require the employer not to furnish baked goods to any shop at which a strike or lock-out is in progress."

SOURCE: Bureau of Labor Statistics Bulletin No. 673,

"Wages, Hours, and Working Conditions in Union Bakeries," June 1, 1939, p. 15.

* * *

(Based on analysis of 854 Building Trades agreements in files of Bureau of Labor Statistics)

". . . the plumbers and steamfitters may not sign an agreement containing a clause which prohibits sympathetic strikes; . . ."

SOURCE: Bureau of Labor Statistics Bulletin No. 680, "Union Wages, Hours and Working Conditions in the Building Trades," June 1, 1941, p. 35.

* * *

(Based on analysis of 82 Brewery agreements in files of Bureau of Labor Statistics)

"Among the other provisions in these agreements is the usual requirement that union materials and machinery be given preference. In some cases only union-made malt and syrup may be used."

SOURCE: Serial No. R. 379, Monthly Labor Review, April 1936, "Collective Agreements in the Brewery Industry, 1935," p. 8.

* * *

(Based on analysis of 120 agreements with United Electrical, Radio and Machine Workers' Union, covering electrical equipment and radio manufacturing plants and machine shops, on file with Bureau of Labor Statistics)

"A number of agreements prohibit their members from working on contract jobs for companies where workers are on strike. Also, members of the union are not required to work when other employees of the company are on strike. The latter provision applies to shops where the Electrical, Radio and Machine Workers cover production employees and highly skilled craftsmen are members of other unions."

SOURCE: From Monthly Labor Review, July 1938, Serial No. R. 779, "Collective Bargaining by United Electrical, Radio and Machine Workers," p. 8.

* * *

(Based on analysis of 20 Shoe Workers agreements in files of Bureau of Labor Statistics)

"A large majority of the agreements provide that the

union may refuse to work on material coming from an employer against whom a strike has been called, or who lets out home work, or (less frequently) from a factory not in contractual relationship with the United Shoe Workers. A large number prohibit home work or the sending out of work by the employer with whom the contract is made, except where lack of factory facilities makes it necessary, and then only with the permission of the union."

SOURCE: From Monthly Labor Review, November 1938, Serial No. R. 843, "Collective Agreements of the United Shoe Workers," p. 3.

* * *

(Based on analysis of 54 Rubber Workers agreements in files of Bureau of Labor Statistics)

". . . the extension of the union's bargaining power for the aid of employees in other plants is established in one case by a clause which prohibits the company from aiding or abetting any firm in which a legitimate labor dispute is in progress."

SOURCE: Serial No. R. 1000, from Monthly Labor Review, September 1939, "Collective Bargaining by United Rubber Workers," p. 3.

* * *

(Based on analysis of 78 Guild agreements in files of Bureau of Labor Statistics)

"Approximately one-fourth of the agreements prohibit Guild members from handling work for shops on strike. In some cases, the provision is to apply only if the publisher is a direct party to the strike. Six agreements specifically state that no employee may be required to take over the duties of any employee in another department in the event of a strike nor to work in any department of another newspaper where a labor dispute exists."

"In five agreements Guild members are not required to pass through picket lines formed by other unions as a result of a labor dispute at the newspaper plant. In two of these cases, recognition of the picket line first must be ordered by the Guild's executive board after consultation with the publisher."

SOURCE: Serial No. R. 1102, from Monthly Labor Review, April 1940, "Collective Bargaining by the American Newspaper Guild," p. 13.

* * *

(Based on analysis of 28 agreements in Shipbuilding which were on file with Bureau of Labor Statistics)

"Several of the agreements specify in detail the various kinds of work stoppages which are prohibited. Four agreements, however, specifically give the union members the right to refuse to do struck work, one of these applying only to strike approved by the Metal Trades Council. Three other agreements give employees the right to refuse to pass through picket lines. On the Pacific coast, the A. F. of L. Metal Trades convention in February 1940 agreed that 'there will be no cessation of work because of any jurisdictional dispute which may arise.' To carry out this policy the unions agreed to ignore any picket line established in the course of a jurisdictional dispute."

SOURCE: Serial No. R. 1179, from Monthly Labor Review, September 1940, "Union Agreements in Shipbuilding," p. 14.

* * *

(Based on analysis of 40 agreements in the Leather-Tanning Industry which were on file with Bureau of Labor Statistics)

"About half of the agreements provide that employees cannot be forced to work on leather coming from or going to a struck tannery, provided the company has been notified of the strike. Moreover, in several agreements the company specifically agrees not to hire 'strike breakers.'"

SOURCE: Bureau of Labor Statistics Bulletin No. 777, "Union Agreements in the Leather-Tanning Industry, 1943," p. 19.

* * *

(Based on analysis of 16 agreements in Cigar Manufacturing Industry which were on file with Bureau of Labor Statistics)

"Four agreements prohibit employers from forcing em-

ployees to do work for another plant which is on strike."

SOURCE: Bureau of Labor Statistics Bulletin No. 847, "Union Agreements in the Tobacco Industry, January 1945," p. 25.

The New York State Department of Labor's analysis of Teamster contracts in effect on November 30, 1948 covering approximately 70,000 workers of 27 New York City locals reports:

> "A number of contracts, however, recognize the right of the workers covered to refuse to (1) handle goods involved in a labor dispute, (2) cross a picket line, (3) work with strikers, or (4) work if endangered by violence or threats of violence." [83]

In 1942, the Bureau of Labor Statistics issued a comprehensive report on union agreements, which contained a "comprehensive collection of illustrations of the various provisions of written agreements between employers and employees in the United States." [84] With respect to "hot cargo" clauses, the Bureau notes:

> "Sympathetic support by members of one union for organized workers in other plants or in other trades and industries often finds expression in union agreements. Any union looks upon nonunion conditions of work as a threat to its own union working standards. *Consequently it is often provided in agreements that the employer may not require employees to work on material coming from or destined for manufacturers not operating under union agreements.* Other agreements limit the prohibition to material coming from employers who have been declared 'unfair' to organized labor by an affiliated union. This reduces considerably the list of restricted manufacturers, since many employers who do not deal with organized labor have never been declared 'unfair' by union having nominal

[83] *Provisions of Teamsters' Union Contracts in New York City*, Division of Research and Statistics, Department of Labor, State of New York, Publication No. B-24, July 1949, p. 36.

[84] U. S. Department of Labor, Bureau of Labor Statistics, *Union Agreement Provisions*, Bulletin No. 686 (1942) p. VII.

jurisdiction. Another alternative merely prohibits work on materials coming from or destined for manufacturers whose employees are on strike. Agreements covering factory production workers may require that all building repairs and maintenance work as well as all hauling of goods and materials into and away from the employer's premises must be done by union workers."[85]

In a later publication dealing with Strike and Lockout provisions in union contracts, the Bureau wrote:

"The right of union members to refuse to handle or work on struck goods, or on nonunion or 'unfair' goods is recognized in many agreements. *Similarly, the employer may pledge not to do any work for, or not to handle any product of, a firm struck by the signatory or an affiliated union.* Some clauses state that the contract may be terminated if an employer requests union members to handle goods from a plant not under contract with the signatory union."[86]

Illustrative contract clauses taken from this publication, which deal with refusal to handle or work on unfair goods, are reproduced in Appendix B.

The Bureau of National Affairs, in its *Collective Bargaining Contracts* (1941), comments on and illustrates a variety of "hot cargo" clauses negotiated by different unions. See Appendix C.

"Hot cargo" clauses are not limited or restricted to small-scale industry or to craft unions. As shown in Appendix D, they also occur in the automotive and aviation parts manufacturing industry.

Such clauses also appear in contracts covering engineering employees (Federal Telecommunications Laboratories, Div. of ITT, Nutley, New Jersey; and Local 400, IUE, AFL-CIO, effective September 20, 1954); and employees in the broadcasting industry:

"It is interesting to note that in some segments of the

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[85] Ibid., p. 32. Emphasis supplied.

[86] U. S. Department of Labor, Bureau of Labor Statistics, *Collective Bargaining Provisions: Strikes and Lockouts; Contract Enforcement*, Bulletin No. 908 13, November 1949, p. 37.

radio industry the 'struck' work concept has been accepted in collective bargaining contracts. Some broadcasters and the American Federation of Radio Artists have agreed that employees should not be asked to furnish services to a struck employer in excess of those normally or regularly provided."[87]

Note also the following clause from an agreement between the Columbia Broadcasting System and technicians represented by the International Brotherhood of Electrical Workers:

"(c) No technician shall be required to air, record or otherwise handle any program or announcement on tape, film, wire, records, transcriptions or other media which is produced or processed in an establishment where a strike by the IBEW is in progress or which has been listed as unfair by the International Office of the IBEW. The terms of this subsection shall not apply to any such program material which was already on hand or produced prior to the commencement of such strike.

"(d) Nothing in this Agreement shall be construed to prevent or interfere with the feeding of a program or programs from CBS and/or any of the CBS stations covered by this Agreement to another station or stations where such action is pursuant to a contractual obligation entered into prior to the commencement of any strike. However, nothing in this Agreement shall be construed as obligating Technicians to accept for air purposes or otherwise handle a program or announcements in contravention of sub-Section (c) hereinabove."[88]

Examples of "hot cargo" provisions can be found in countless other industries. The record presented, however, adequately indicates the wide-spread occurrence of such clauses in current-day collective bargaining.

Analogous to union contract "hot cargo" clauses are the provisions in union constitutions which prohibit members

[87] Charles H. Tower, *A Perspective on Secondary Boycotts*, Labor Law Journal (Commerce Clearing House, Inc.) Vol. 2, No. 10 (October 1951) p. 738.

[88] Columbia Broadcasting System, Inc., and International Brotherhood of Electrical Workers, effective May 1, 1956, Art. I, Sec. 1.07 (c) & (d).

from working on unfair or nonunion goods or materials. Illustrative constitutional provisions on this point are included in Appendix E.

V. CONCLUSIONS

The right to refuse to handle unfair goods through the use of so-called "hot cargo" clauses agreed to in advance by the employer is a legitimate union technique to advance the union's interests through extended organization. The objective is to eliminate the differential existing between union and nonunion wages in the industry and to preserve wage standards and working conditions against deterioration and against the impact of wage undercutting by nonunion employers.

Justification for use of "hot cargo" clauses is based on the worker's economic self-interest and his right to protect his economic position in society by (a) not being compelled to participate in any activity designed to injure him, and (b) not being prevented from soliciting the support of others in an effort to protect his economic position.

The right of workers to organize for their mutual aid and protection suffers a severe setback when unions are deprived of a primary weapon—not only to withhold their services but to persuade other fellow workmen, members of the same union, to do likewise.

Strikes are not always successful. Employers are as free to gain support from other employers and the public as are unions to seek such support. Often in a strike, one employer "farms out" his struck work to other employers to produce his product while his workers are on strike.

Under these circumstances, labor often appeals to workers outside the struck plant not to lend their labor in handling the product—whether it be manufacturing, transporting or selling.

Of what value is the workman's organization unless it can

be used for his protection? If restricted in his assistance to fellow unionists, the organizational power and unity of his national union is torn to shreds; the protective shield over unionized standards is fractured.

Conditions for working people were won in the past only by labor's utilizing the united strength of large groups of unions supporting one another. This unity meant strength and protection for wage scales and working conditions.

The National Labor Relations Act states that workmen should have the right to combine for their "mutual aid and protection."

There is nothing which prevents one employer or group of employers acting singly or in concert, from rendering economic assistance to each other, providing such assistance is not for an unlawful purpose.

It is not an unfair labor practice for groups of employers to bring social and economic pressure on other employers to refrain from a certain course of dealing with labor unions. Courts have upheld the actions of employer associations in demanding that their members lock out all workers because one of their members was engaged in labor dispute. Such conduct on the part of employer groups comes within the sphere of permitted mutual assistance activity on their part.[89]

The following revealing comment by the president of the Southern Hosiery Manufacturers Association, Taylor R. Durham, of Charlotte, N. C., following the group's annual meeting at Roanoke, Va., on September 13, 1951 illustrates employer assistance to other employers:

> "An important function of the association is not covered by the report but was explained in a confidential session of the meeting and is mentioned here on the same basis. *We refer to the assistance given to milk*

[89] *Davis Furniture Co.* v. *NLRB*, 9th Circuit, San Francisco, June, 1953, 32 LRRM 2305.

where the union is making an effort to organize them, and while only a small part of the credit is claimed for the results during the year you will be interested to know that out of 13 elections since last September not a single one has been finally determined in favor of a union."[99]

Why then should working people be prevented from rendering the only effective form of economic assistance to each other which they are capable of giving?

Simple justice and equity should permit workers to attempt by all peaceful means to procure the cooperation of other union members in seeing to it that struck or unfair employers are not able to operate. Workers should have the positive right to engage in legitimate self-help and mutual assistance activities. It is neither reasonable nor equitable to withdraw from unions and only from unions (since employers are not similarly restricted) the right to engage in activities protecting themselves and their fellow union members.

The union can stabilize its established standards in the unionized shops only by insuring them against competition from nonunion mills.

Surely, there is no reason why union members should be compelled to be strike-breakers. A ban on "hot cargo" clauses forces workers, against their good judgment or choice, to abet the undercutting of wage standards in their trade, and to help undermine the standards established through collective bargaining, though these workers know full well that by doing so they inflict injury upon themselves, their fellow unionists, and fair employers.

Vitiating "hot cargo" clauses is worth untold millions of dollars to sweatshop or sub-standard employers who exploit labor.

In a free economic society, withdraw the right to refuse

[99] *Hosiery Worker*, official organ of the American Federation of Hosiery Workers, AFL, January 1952, Editorial. (Emphasis supplied).

to handle unfair goods, and unionism is illusory. *Trade unionism functions as much as a protection against the unorganized as it operates to bring benefits to organized workers.* Trade unionism by its very nature must expand and extend over the entire industry, in many cases despite the apathy of unorganized workers.

While it is the privilege of any worker to work for substandard or even starvation wages if he wishes, he has no right to impose the consequences of this privilege on his fellow workers. Unionists who, through many sacrifices, have achieved certain minimum standards vital not only to themselves but to the welfare of the whole community, have a morally greater right to seek to protect such standards against destruction.

It has been our national policy to eliminate competition in wage rates, not to foster competition in sweatshop conditions. It has been the objective of our national policy to prevent the kind of competitive advantages secured at the expense of workers. It has been our national policy to further the establishment of uniform standards of compensation, to further the concept of equal pay for equal work. It has been our national policy to insist that competitive advantages be based upon improvement in efficiency, in organization, in technology and all the other factors which go into progressive productive policy.

Denial of the self-help technique of refusal to handle the goods of an unfair employer who jeopardizes union gains and imperils fair employers through substandard conditions negates this national policy.

The primary object of "hot cargo" clauses is to extend union organization and to protect collective bargaining. Rendering such clauses ineffective weakens the collective bargaining process by denying a necessary economic tool to unions and by compelling them to contribute to their self-destruction. "In the dynamic field of industrial relations,

government must take care not to side with either management or the labor union during the time of economic conflict." [91]

A labor movement can never long stand still; it must grow stronger or weaker, and in a democracy, it must inevitably grow stronger. And a labor movement is all the stronger which accomplishes its growth through its own efforts. The "hot cargo" principle, which is at issue in this case, is a traditional union method of self-help, and its use is necessary and justified.

[91] Witney, *op. cit.*, p. 445.

APPENDIX A

ILLUSTRATIVE
UNFAIR, NON-UNION OR STRUCK GOODS CLAUSES
IN
COLLECTIVE BARGAINING CONTRACTS
1923—1927

SOURCE:

Trade Agreements, 1923 and 1924, Bulletin No. 393, Bureau of Labor Statistics, U. S. Department of Labor, September, 1925;

Trade Agreements, 1925, Bulletin No. 419, Bureau of Labor Statistics, U. S. Department of Labor, September 1, 1926;

Trade Agreements, 1926, Bulletin No. 448, Bureau of Labor Statistics, U. S. Department of Labor, July, 1927; and;

Trade Agreements, 1927, Bulletin No. 468, Bureau of Labor Statistics, U. S. Department of Labor, December, 1928.

UNFAIR FIRMS, GOODS AND JOBS

Brewery Local No. 293, Los Angeles, California, dated March 21, 1924:

> "... members of Local No. 293, Los Angeles, in section 11 of their agreement dated March 21, 1924, refuse 'to handle or bottle any product of any brewery that is declared unfair' by the union." BLS Bulletin No. 393, p. 13.

Extracts from various local agreements:

> "No contractor or employer shall ... require his men to work on any unfair job." BLS Bulletin No. 393, p. 26.

Painters Local No. 498, Jamestown, New York, dated April 1, 1925:

"Art. X. The refusal of members to work on a non-union or unfair job shall not be considered a violation of this agreement." BLS Bulletin 419, p. 46.

Hotel and Restaurant Employees Local No. 62, Fresno, California, dated May 8, 1925:

"XI. No member of Local No. 62 shall be required to handle, prepare, or serve . . ., the goods of any firm or corporation which has been declared unfair by the Fresno County Labor Council, nor to work with employees or any firm or corporation which has been declared unfair by the Fresno County Labor Council or the Fresno Building Trades Council." BLS Bulletin 419, p. 84.

Machinists Local No. 514, Duquoin, Illinois, dated 1925:

" . . . It shall be considered a violation of this contract to accept work coming from a struck shop or other shops unfair to organized labor." BLS Bulletin No. 419, p. 93.

Printing Pressmen's Local No. 3, Chicago, Illinois, dated March 27, 1925:

"The union reserves the right to its members to refuse to execute any and all unfair work destined to or from unfair employers." BLS Bulletin No. 419, p. 121.

Stone-Working Trades — Tool sharpeners' agreement with Granite Manufacturers' Association of Quincy, Massachusetts, April 1, 1925:

"Sec. 13. Members of the Quincy Granite Manufacturers' Association agree not to supply power or compressed air to any firm rated as unfair by Quincy branches, G. C. I. A., or to do any polishing for any such firm." BLS Bulletin No. 419, p. 141.

Cleaners, Dyers, and Pressers Union, Local No. 17834, Detroit, Michigan, March 22, 1926:

"Art. 11. Members of the union shall not be required

to work on orders placed by firms unfair to said union, and refusal of such members to work on such orders shall not be considered a violation of this agreement." BLS Bulletin No. 448, p. 68.

Meat Cutters and Butcher Workmen Local No. 115, San Francisco, California, August 26, 1927:

"Sec. 9. No member of this union shall be allowed to handle any fresh or cured meats coming from an unfair firm." BLS Bulletin No. 468, p. 101.

Photo-Engravers Local No. 19, Milwaukee, Wisconsin, January 2, 1927:

"4. It is further expressly agreed and stipulated that members of said Milwaukee Photo-Engravers' Union No. 19 employed by the party of the first part shall not be compelled to work upon or in completion of any work coming from an unfair shop. 'Unfair shop' shall be and is understood to mean one known or designated as 'open' or 'nonunion' or in which there is a strike or lockout of the members of the International Photo-Engravers' Union." BLS Bulletin No. 468, p. 140.

NONUNION GOODS NOT TO BE USED

Amalgamated Meat Cutters and Butcher Workmen of North America Local No. 1, Syracuse, New York, December 1, 1923:

"Art. 9. Union meat cutters will not be required to sell nonunion sausage products of any kind, the preference of purchase to be granted to local industry . . ., as far as practicable. This article proposed and adopted by the Master Butchers of Syracuse and accepted by this union in the interest of home industry." BLS Bulletin No. 393, p. 69.

Bakery and Confectionery Workers' Local No. 30, Syracuse, New York, May 1, 1926:

"Section 8. Lunch rooms and restaurants employing members of Local No. 30 and recognizing the union under the provisions of this agreement shall refrain

from using nonunion bakery goods in their respective business establishments, providing union-made bakery goods can be procured through recognized union bakeries under jurisdiction of Local Union No. 30." BLS Bulletin No. 448, p. 15.

Journeymen Stonecutters' Association of New York and Newark, January 1, 1926:

"Art. XI. There shall be no strikes, lockouts, or stoppage of work, but the union reserves the right to refuse to work either with nonunion men or on nonunion material." BLS Bulletin No. 448, p. 65.

Laundry Workers' Local No. 207, Detroit, Michigan, March 15, 1926:

"XIII. The union hereby reserves the right to refuse to execute 'struck' work, washed at steam laundries where strike-breaking labor is being employed, and also the right to join a general strike in the event such a strike is called." BLS Bulletin No. 448, p. 92.

Sheet-Metal Workers' Local No. 263, Cedar Rapids, Iowa, April 1, 1926:

"Art. 4. No journeyman shall be requested by the Employer or permitted by the union to erect any manufactured articles, such as gutters, furnace fittings, finals, ventilators, cornices, skylights, valley tin, etc., unless they bear the union label; except such articles or ornaments as are patented and specified by an architect and such goods as the general run of the shops are in no position to manufacture.

"Art. 16. No journeyman shall work on any job that has been declared unfair by the Cedar Rapids Building Trades Council or council under whose jurisdiction he may be working." BLS Bulletin No. 448, p. 107.

Granite Cutters' International Association, Chicago, Illinois branch, April 1, 1927:

"Sec. 27. The Chicago branch reserve his right not to cut granite coming from nonunion quarries." BLS Bulletin No. 468, p. 39.

Plasterers' Local No. 508, Greensburg, Pennsylvania, May 1, 1927:

> "Sec. 2. No member of the Operative Plasterers and Cement Finishers' International Association shall use or handle any models or casts that do not bear the stamp of a union shop, as both are made by members of our association." BLS Bulletin No. 468, p. 55.

REFUSAL TO EXECUTE STRUCK WORK

International Typographical Union Local No. 6, covering newspapers in New York City, January 1, 1924:

> "28. This union reserves the right to its members to refuse to execute all struck work received from or destined for unfair employers or publications.
> "29. All union machine offices are prohibited from supplying machine composition to nonunion offices." BLS Bulletin No. 393, p. 90.

Press Assistants' Local No. 42, Washington, D. C., April 29, 1924:

> ". . . no work that comes under the jurisdiction of . . . Union No. 42, . . . shall be done in the pressrooms of the Closed Shop Division of the Typothetae of Washington, D. C. (Inc.) for any person or firm that becomes involved in a strike or lockout with said union." BLS Bulletin No. 393, p. 103.

Electrotypers' Local No. 3, Chicago, Illinois, April 30, 1924:

> "1. The party of the second part reserves to its members the right to refuse to execute all struck work received from or destined for unfair employing electrotypers or stereotypers." BLS Bulletin No. 393, p. 106.

Bakery Salesmen's Local No. 335, Kansas City, Missouri, May 1, 1923:

> "Art. 6. Where there is a strike or lockout it will not be considered a violation of this contract for salesmen to refuse to serve the same." BLS Bulletin No. 393, p. 121.

International Typographical Union, model contract:

"Sec. 48. The union reserves to its members the right to refuse to execute all work received from or destined for struck offices, unfair employers, or publications." BLS Bulletin No. 419, p. 107.

International Typographical Union Local No. 3, covering newspapers in Cincinnati, Ohio, May 1, 1925:

"Sec. 42. The union reserves the right for its members to refuse to execute all struck work received from or destined for unfair employers or publications." BLS Bulletin No. 419, p. 110.

International Photo-Engravers' Local No. 34, Kansas City, Missouri, March 1, 1925:

Sec. 8. It is understood and agreed that no work is to be done by members of said union when such work emanates from employing photo-engravers participating in or concerned in a strike or lockout with or against members of the International Photo-Engravers' Union of North America. And it is further understood that where the enforcement of this clause entails any loss on the employer party to this contract, said loss shall be borne by the firm, provided that said firm shall have been notified of such strike or lockout." BLS Bulletin No. 419, p. 119.

Amalgamated Association of Street and Electric Railway Employees, Division No. 697, Toledo, Ohio, May 31, 1925:

"Sec. 54. It is agreed that no work shall be done by the mechanical department for any other transportation company that may be unable to do their own repair work because of labor trouble such as strikes or lockouts." BLS Bulletin No. 419, p. 131.

International Brotherhood of Bookbinders Local No. 4, Washington, D. C., April, 1926:

". . . no work that comes under the jurisdiction of Journeymen Bookbinders' Union No. 4 shall be done in the bindery sections of the Typothetae of Washington, D. C. (Inc.), Closed Shop Division, for any

person or firm that becomes involved in a strike or lockout with said union: *Provided*, That in each particular case protest is made to the Typothetae of Washington, D. C. (Inc.), Closed Shop Division, by the executive committee of Journeymen Bookbinders' Union No. 4." BLS Bulletin No. 448, p. 119.

International Typographical Union Local No. 16, covering newspapers in Chicago, Illinois, May 22, 1926:

"Par. 11. The union reserves the right to refuse to execute all work received from or destined for struck offices or 'unfair' employers or publications; provided, that nothing herein contained shall authorize members of the union to refuse to handle type or plate matter to be used in the news or advertising columns of the newspapers of the publishers who are parties to this contract." BLS Bulletin No. 448, p. 121-122.

International Typographical Union Local No. 58, covering job and commercial houses in Portland, Oregon, October 4, 1926:

"The said Typographical Union No. 58, party of the second part, hereby reserves to its members the right to refuse to execute all struck work received from or destined for unfair employers or publications." BLS Bulletin No. 448, p. 128.

International Photo-Engravers' Union, various locals covering Washington, Oregon and British Columbia, January 1, 1926:

"Second C. It is further understood and agreed that no work is to be performed by members of said union when such required work emanates from employing photo-engravers participating in or concerned in a strike or lockout with or against members of the International Photo-Engravers Union of North America.
"Second E. The union reserves the right to its members to refuse to execute all struck work in any shop or any department under the jurisdiction of the Allied Printing Trades Council which is considered unfair by same council; subject, however, to adoption by each

local joint industrial council." BLS Bulletin No. 448, pp. 134-135.

International Printing Pressmen and Assistants' Local No. 63, Sioux City, Iowa, September 1, 1926:

"Sec. 6. It is further agreed by the Sioux City Pressmen's Union No. 63 that there shall be no limit put upon the output of the presses of the employing printers of Sioux City, except that in case of struck work the members of Sioux City Pressmen's Union No. 63 have the right to refuse to perform same." BLS Bulletin No. 448, p. 138.

International Stereotypers and Electrotypers' Union Local No. 65, Seattle, Washington, February 1, 1926:

"Sec. 4. Seattle Stereotypers and Electrotypers' Union, No. 65, reserve to its members the right to refuse to execute work destined for a struck newspaper stereotype room in the State of Washington; provided the party of the second part must give the party of the first part 48 hours' notice that a strike is in progress in said struck newspaper stereotyping room before the said right may be exercised. Incoming work for use by the Star Publishing Co. shall be executed without question." BLS Bulletin No. 448, p. 143.

Amalgamated Lithographers of America, Local No. 6, Cleveland, Ohio, April 1, 1927:

"7. It is further stipulated and agreed that the party of the first part shall not during the life of this contract enter into any association or combination hostile to the Amalgamated Lithographers of America, nor shall it any time render assistance to such hostile combination or association by suspension of lithographic work or by any other act calculated to defeat, impede, or interfere with the policies or activities of the said parties of the second part with relation to its members or any person, firm, or corporation in the lithographic or kindred business.

"8. Said party of the first part jointly and severally observing and fulfilling the terms and conditions hereof on their part to be performed, said party of the second part agrees not to do any act hostile or detri-

mental to the business of the parties of the first part.

"9. The parties of the second part reserve to themselves and their members the right to refuse to execute work received or destined by any employer or employers with whom it may have any controversy or dispute." BLS Bulletin No. 468, p. 139.

International Photo-Engravers Local No. 57, Springfield, Massachusetts, January 1, 1927:

"Art. XII. That the employing photo-engravers party to this agreement will, in employing help, give preference to members of the International Photo-Engravers' Union of North America in any and all processes of photo-engraving and kindred processes and parts thereof; and it is further understood that no work shall be done by members of said union when such work emanates from employing photo-engravers engaged or involved in a strike or lockout against members of the International Photo-Engravers' Union." BLS Bulletin No. 468, p. 143.

FURNISHING GOODS TO A STRUCK SHOP

Union Cloth Hat and Cap Makers, Joint Council of New York, July 1, 1924:

"(c) Workers shall not be required to work for any firm, member of the association, which will work for or supply work to any manufacturer or jobber during the pendency of strikes called or conducted by the union against the latter firm.

"(d) The union reserves the right not to permit its workers to perform work for any member of the association who does any work for firms or who sells goods to firms against whom the union has declared a strike, or who sends goods to such firms, its principals, agents, factors, or jobbers during the pendency of such a strike, and the calling of a strike by the union against a member of the association to enforce the right hereby reserved shall not be construed as a violation of this collective agreement."
BLS Bulletin No. 393, p. 50.

International Ladies' Garment Workers' Union, Joint Board of the Cloak, Skirt, Dress, and Reefer Makers' unions, New York, New York, July 16, 1924:

"Seventh. (a) No member of the association shall order or purchase garments from any manufacturer whose workers are on strike, nor shall any member of the association make or cause to be made any work for any person against whom the union has declared a strike until such strike in each case has been fully settled."
BLS Bulletin No. 393, p. 55.

Amalgamated Clothing Workers of America, Joint Board of Philadelphia, Pennsylvania.

"8. The firm agrees that no work shall be made in any of its shops for any firm or manufacturer against whom a strike may be on."
BLS Bulletin No. 393, p. 58.

International Brotherhood of Bookbinders Local 31 and Bindery Women's Local No. 125, San Francisco, California, March 8, 1923:

". . . no work that comes under the jurisdiction of the union shall be done in the bindery departments of the employers for any person or firm that becomes involved in a strike or lockout with the union or in whose bindery departments members of the union are not allowed to work; provided that, in each particular case, protest is made to the employers."
BLS Bulletin No. 393, p. 85.

Paper Cutters' Union Local No. 119, New York, New York, September 1, 1924:

"56. The union reserves the right to its members to refuse to execute any or all struck work received from or destined to unfair employers or publications."
BLS Bulletin No. 393, p. 86.

International Association of Machinists, Local No. 514, Duquoin, Illinois, 1925:

"It shall be considered a violation of this contract to accept work coming from a struck shop or other shops unfair to organized labor."
BLS Bulletin No. 419, p. 93.

Bakery and Confectionery Workers' Local No. 4, St. Louis, Missouri, May 1, 1926:

"Art. 17. That I will not compel my bakers or helpers to manufacture any goods for any concern where the employees are on a strike or locked out."
BLS Bulletin No. 448, p. 12.

Cloth Hat, Cap, and Millinery Workers' Local No. 6, Philadelphia, Pennsylvania, 1926:

"18. Workers shall not be required to work for the employer if he will work or supply work to any manufacturer or jobber during the pendency of strikes called or conducted by the union against the latter firm.
"19. The union reserves the right not to permit its members to perform work for the employer if the employer should do any work for firms who sell goods to firms against whom the union has declared a strike or who sends goods to such firms, its members, agents, factors, or jobbers during the pendency of such a strike, and the calling of a strike by the union against the employer to enforce the right hereby reserved shall not be construed as a violation of this agreement."
BLS Bulletin No. 448, p. 70.

Cloth Hat, Cap, and Millinery Workers' Local No. 25, Lowell, Massachusetts, August 21, 1926:

"11. It is agreed by both parties that the practice of giving out work to outside shops encourages the establishment and development of the so-called corporation and social shops which are undermining the industry by cutthroat competition by lowering of working conditions and standards and by cheapening the quality of the work, the cumulative effect of which is to reduce the trade to the position of a sweatshop industry. The employer accordingly pledges himself to counteract the foregoing tendencies existing in the trade and agrees to maintain the highest possible standards of working conditions and quality of production. The union, on the other hand, pledges itself to cooperate in the establishment of uniform working conditions and standards throughout the trade by using all legitimate efforts to introduce the same working conditions as prevail in all

the other shops of the cloth hat and cap trade in the Boston market."
BLS Bulletin No. 448, p. 72.

"20. The union reserves the right not to permit its members to perform work for the employer if he sells or buys goods to or from firms against whom the union has declared a strike, or who sends goods to such firms, its agent, factors, or jobbers during the pendency of such a strike, and the calling of a strike by the union against the party of the first part to enforce the right hereby reserved shall not be construed as a violation of this collective agreement."
BLS Bulletin No. 448, p. 72.

International Fur Workers' Local No. 45, Chicago, Illinois, August 16, 1926:

"The firm further agrees that it will not do any work for any firm whose workers are on strike."
BLS Bulletin No. 448, p. 73.

International Ladies' Garment Workers' Union, Joint Board of Cloak, Skirt, and Dress Makers' Union, Locals Nos. 12, 39, 46, 56, 73, and 80, Boston, Massachusetts, February 18, 1926:

"29. The employer agrees not to do any work for or to sell any goods or merchandise to, nor have any work done by, or purchase from firms or their principals, agents, factors, or jobbers during the pendency of a strike declared by the union against such firm."
BLS Bulletin No. 448, p. 77.

Joint agreement of the Waterproof Garment Workers Local No. 20, Cutters Local No. 10, Pressers Local No. 35, and Buttonhole Makers Local No. 64, New York, New York, 1926:

"(f) The employer agrees not to do any work for persons or firms, nor shall he buy from or sell to persons or firms against whom the union has declared a strike, nor shall he send any goods to any contractors or agents of such persons or firms during the pendency of such strike."
BLS Bulletin No. 448, p. 81.

International Pocketbook Workers Union, July 21, 1926:

"In the event that the union will call a strike in any shop having business relations with a member of the association the union shall so notify the association, and the members of the association shall thereupon discontinue business relations with such shops."

"19. No member of the association is to do any work for any other leather goods firm whose factory has been declared on strike by the union. All contracts on hand shall be taken into consideration by the joint grievance board."

BLS Bulletin No. 448, p. 96.

Bindery Women's Local No. 100, Columbus, Ohio, March 23, 1926:

"In case of a strike in a union ship, members of this union shall not perform any work received from or destined for such shop during the continuance of such strike."

BLS Bulletin No. 448, p. 120.

Bakery and Confectionery Workers Union, Jewish Local No. 500, New York, New York, May 1, 1927:

"Seventeenth: In case of a strike in any one of the shops of the employer by the workmen belonging to a union which is recognized by one of the central organizations with which this union is affiliated, the union should be relieved from the obligation of this agreement in all shops belonging to his firm.

"Eighteenth: The party of the second part further agrees not to sell, buy, or deliver bread, rolls, or cakes or pretzels directly or indirectly to any persons or companies against whom a strike was duly declared by the party of the first part."

BLS Bulletin No. 468, p. 12.

Cloth Hat, Cap, and Millinery Workers' Local No. 8, Baltimore, Maryland, January 6, 1927:

"6. Workers shall not be required to work for the employer if he will work or supply work to any manufacturer or jobber during the pendency of strikes called or conducted by the union against the latter firm.

"7. The union reserves the right not to permit its mem-

bers to perform work for the employer if the employer should do any work for firms who sell goods to firms against whom the union has declared a strike or who send goods to such firms, its members, agents, factors, or jobbers, during the pendency of such a strike, and the calling of a strike by the union against the employer to enforce the right hereby reserved shall not be construed as a violation of this agreement."
BLS Bulletin, No. 468, p. 71.

International Fur Workers' Locals Nos. 1, 5, 10, and 15, New York City, February 1, 1927:

"25. The firm is not to do any work or send any work to any concern against whom the union shall be conducting a strike during the pendency of the strike."
BLS Bulletin No. 468, p. 73.

United Leather Workers' International Union, Suit-Case, Bag, and Portfolio Makers' Local, New York, New York, 1927:

"16. It is hereby agreed that no work shall be done in the factory of the employer for any leather-goods firm whose factory has been declared on strike by the union, or vice versa."
BLS Bulletin No. 468, p. 96.

International Brotherhood of Blacksmiths, Drop Forgers, and Helpers District Council No. 1, Chicago, Illinois, May 1, 1927:

"Art. 11. In case either strike or lockout in other shops by our members and work done by them shall be received by the above company our members reserve the right according to the constitution to refuse to do such work without violating the terms of this agreement. Union men shall not be required to work with non-union men."
BLS Bulletin No. 468, p. 103-104.

International Brotherhood of Teamsters Local No. 742, Chicago, Illinois, May 1, 1927:

"Art. XVII. It will not be considered a violation of this agreement on the part of any driver who refuses

to deliver goods to parties involved in any lockout or legal strike of any union."
BLS Bulletin No. 468, p. 202.

"HOT GOODS" CLAUSES IN TEAMSTER CONTRACTS 1923—1927

International Brotherhood of Teamsters Local No. 335, Kansas City, Missouri, May 1, 1923:

"Art. 6. Where there is a strike or lockout it will not be considered a violation of this contract for salesmen to refuse to serve the same."
BLS Bulletin No. 393, p. 121.

International Brotherhood of Teamsters Local No. 405, St. Louis, Missouri, January 1, 1925:

"Art. 24. Members of Local No. 405 will not be allowed to haul passengers known to be strike breakers to or from a place that is on strike or that is under police protection."
BLS Bulletin No. 419, p. 149.

International Brotherhood of Teamsters Local No. 553, New York, New York, January 1, 1926:

". . . If any concern is unfair, it shall not be a violation of this agreement for men to refuse to work for them."
BLS Bulletin No. 448, p. 196.

International Brotherhood of Teamsters Local No. 742, Chicago, Illinois, May 1, 1927:

"Art. XVII. It will not be considered a violation of this agreement on the part of any driver who refuses to deliver goods to parties involved in any lockout or legal strike of any union."
BLS Bulletin No. 468, p. 202.

APPENDIX B

SOURCE:

Collective Bargaining Provisions, Strikes and Lock-Outs; Contract Enforcement, U. S. Department of Labor, Bureau of Labor Statistics, Bulletin No. 908-13, November 1949.

"137. Union May Terminate Contract, After Notice, If Employer Requests Union Members to Work on Goods from Plant Not Under Agreement with the Signatory Union

"In the event the company requests its employees to handle any work normally produced in a [type of product or process] plant, which comes from any trade shop which is not under contract with the [International Union], then the union shall be entitled to terminate its contract with the company by giving proper notice.

"Nothing in this agreement is to be construed as an agreement by an employee that such employee will work on any graining machine, camera, art (production after camera) or platemaking (other than that actually in process in plant) when such products or the result of such work are received from or destined to a plant, against which the [International union] is engaged in a strike." p. 39

"139. Union May Refuse, After Notice, To Work on Material to or from Struck Plant

"In the event of a strike authorized by the international union in the tannery of a leather manufacturer, the employer shall not cause the employees to perform labor on hides or skins coming from or going to such tannery where a strike exists, when notice of the strike shall have been given to the secretary of the ..... Leather Manufacturers' Association in writing, registered mail, postage prepaid.

"140. Union May Refuse, After Notice, To Work on Material from Struck Plant

"The employer shall not cause the employees to work on

skins or wool in process which may be sent to the pullery from another pullery where a duly authorized strike exists, provided notice of such strike is given to the employer by the union, registered mail, postage prepaid.

"141. Refusal to Work on Material for a Struck Plant Not a Violation of Agreement

"Failure or refusal by any employee or all the employees of an employer to perform work destined, directly or indirectly, for a concern on strike, shall not be deemed or interpreted as a breach of the agreement, and neither such employees nor the union shall be held liable in damages by reason thereof. It is agreed that the performance of such work shall not be deemed in the regular course of employment of the workers.

"142. Employer Not To Deal With Firms Where Strike Is In Effect

"No member of the association shall do or cause to be done any work for or deal with any person or concerns against whom the union has declared a strike until such strike has been fully settled.

"143. Goods on Hand or in Transit Exempt from 'Unfair' Work Ban

"No employee shall be required to handle any product which is manufactured or processed in an establishment where a strike is in progress, or listed as unfair to organized labor. All merchandise on hand or in transit is to be exempt.

"144. No Work on Goods Declared Unfair by International Union or CIO Affiliate

"At no time shall employees be required to act as strike-breakers, go through picket lines or armed guards, or handle products declared unfair by the [union] or an affiliate of the Congress of Industrial Organizations.

"145. Union Members May Refuse to Handle Strike Bound Goods or Cross Picket Line of Affiliate of Parent Union or American Federation of Labor

"Nothing in this agreement shall be construed to in anywise limit the unqualified right of the union to refuse to handle strike-bound goods in the event the employer has labor difficulties with any other affiliated union of the international union or any affiliate of the American Federation of Labor, or to require any member of the union to cross the picket line of any other union affiliate of the international union or the American Federation of Labor.

"146. No Processing of New Material or Work Not Connected With Company's Product from Plant Struck by Parent Union

"The company agrees that it will not process any new material or work for profit not connected with its product if such new work comes from a company whose employees are engaged in a strike sanctioned by the international union," pp. 40-41.

"153. Union Allowed to Inspect Employer's Books To Enforce Ban on Struck Work

"It is hereby agreed that no work shall be done in the factory of the employer for any other firm whose factory has been declared on strike by the union. It is also agreed that a representative of the union shall have the right to inspect at any time the books of the employer for the purpose of ascertaining for whom the employer is working or selling his merchandise to, or is buying ready-made goods from." p. 43.

APPENDIX C

SOURCE:

Collective Bargaining Contracts, Bureau of National Affairs, Inc., 1941

PROHIBITION AGAINST USE OF NON-UNION CONTRACTORS

Comment:

For the protection of the union against low-cost non-union competition, many agreements include a prohibition against dealing with any contractor who does not have contractual relations with the union or does not comply with union standards of production. Any employer who gives out his work to such a contractor is deemed to have broken the agreement.

Clauses:

"Penalties for Dealing with Non-Union Contractors—The following agreement required the payment of damages for contracting to non-union contractors. In addition, no work shall be given to any contractor against whom the union has a strike:

> "Whenever it shall appear that the employer gives work to a contractor or manufacturer that is not in contractual relations with the union, upon the request of the union the employer shall forthwith withdraw his work from such firm whether such work be in process of operation or otherwise until the firm enters into contractual relations with the union. In any such case, the employer shall pay the union damages in such amount as the Impartial Chairman (as established under Section —— of this contract) shall determine based on the lost earnings caused members of the union by such violation.
>
> "If and when the union through its representative notifies the employer that his or its contractors are not operating a shop in accordance with the standards herein established, the employer agrees not to give

any further work to such contractor until he has been reinstated by the union in good standing, but it is agreed, however, that garments actually in process shall be completed; all other work to be withdrawn and no further work given. If the employer violates this agreement at any time after twenty-four (24) hours subsequent to being notified by the union, as provided herein, he shall pay the union damages in such amount as the Impartial Chairman shall determine based on the lost earnings caused members of the union by such violation.

"The employer shall not directly or indirectly give work to a contractor or sub-manufacturer, nor purchase any ready-made garments from a manufacturer, nor accept any work from a jobber, against whom the union is conducting a strike. The word, 'Jobber' in this clause shall mean only those who are engaged in the manufacture of garments through the medium of inside or outside shops. (Boston Coat and Suit Manufacturers Assn. *and* International Ladies' Garment Workers' Union—AFL)" pp. 174, 175.

Clause:

"Handling Non-Union Work—This clause, in veiled terms, calls for reference of the question of handling non-union products to a special committee:

"If at any time a product is brought into the Reading plant and the employees and the Union feel it should not be handled, it is agreed that a special grievance committee meeting will be arranged for to discuss the matter in detail. (Armour & Co., *and* Amalgamated Meat Cutters and Butcher Workmen—AFL). p. 256.

NON-UNION GOODS

Comment:

Efforts of unions to extend union conditions throughout an industry frequently result in contractual obligations binding employers not to do business with firms where union conditions do not prevail or where strikes are in progress. Such agreements are found with especial fre-

quency where it is common or feasible to contract work out. See *Contracting Work Out.*

Contracts having the same general purpose may require that the union forbid its members to work for firms not covered by the agreement or provide that the members need not work on 'hot goods', that is, goods from, or destined for, non-union firms or those against whom employees are on strike.

Clauses:

"No Purchases from Non-Signatory Firms—Under this clause, members of an employer association agree not to purchase specified accessories from firms not covered by the contract:

> "Members of the Association who purchase or cause to be manufactured belts, covered buttons, neckwear, artificial flowers, embroideries, buckles, hemstitching, pleating and tucking on garments, shall deal only with such firms as are in contractual relations with the Union. (United Better Dress Manufacturers Assn. *and* International Ladies' Garment Workers' Union—AFL).

"No Selling to Non-Signatory Firms—The employer agrees, under this clause, not to perform work for or sell to any firm not covered by the contract:

> "If the Employer is doing part of his work or all of his work for jobbers or manufacturers or both, in this case the Employer agrees not to make any work for or sell garments to any jobber or manufacturer that does not have any contract with the Union. (Boston Coat and Suit Manufacturers Assn. *and* International Ladies' Garment Workers' Union—AFL).

"Mandatory or Preferential Use of Union-Made Goods—This clause illustrates both partial and complete banning of non-union goods:

> "Only union made malt shall be used. All other union made materials and machinery shall be given prefer-

ence. (Brewery and Beverage Firms, Ice Plants, and Agencies *and* International Union of United Brewery, Flour, Cereal, and Soft Drink Workers—AFL).

"Union May Lift Restriction—Under this clause, the 'hot goods' restriction may be lifted by the union:

> "No printer shall print any pattern delivered from any wall paper mill in the United States which is not in contractual relationship with the Union, nor shall any color mixer mix color therefor, except by the permission of the General Executive Board of the Union. This prohibition contained herein shall extend to any wall paper mill the employees of which are on strike. (Wallpaper Institute *and* United Wallpaper Craftsmen and Workers—AFL).

"Conformity with Union Conditions—Conformity with conditions established by the union may be sufficient to let down the bar against otherwise prohibited goods:

> "The employer agrees not to buy any composition parts of dolls from or to sell any composition parts of dolls to any concern that does not conform to the wages and hours set forth in this agreement and each individual employer agrees that he will not buy from or sell to any concern working under non-union conditions any composition parts of dolls. (Associated Doll Manufacturers of New York, Inc., *and* Playthings and Novelty Workers—CIO).

"Union Need Not Handle 'Hot Goods'—The union reserves, under this clause, the right to refuse to execute all work destined to or from unfair employers:

> "The Union reserves the right to its members to refuse to execute all work destined to or from unfair employers. It is understood and agreed that the term 'unfair employers' as used in this section means unfair employers engaged in the printing or publishing industry operating departments over which the San Francisco Printing Pressmen and Assistants Union No. 24 or affiliated local unions have jurisdiction. It is understood and agreed that this clause shall not apply to the Employers so far as employees in their

plants are concerned who are working under a bona fide agreement with any lawful collective bargaining unit. (Employing Printers' Assn. *and* San Francisco Printing Pressmen—AFL).

"No Union Labor To Be Furnished Non-Signatory Firms—This clause binds the union to withhold workers from firms not parties to the contract:

> "The parties of the first and second parts agree that neither the Union nor Local No. 3 will furnish workers to shops which are not in contractual relationship with Local No. 3. (Fur Dressers Guild and Independent Firms *and* Fur and Leather Workers Union—CIO). pp. 394, 395.

"Refusal to Handle 'Unfair' Goods—The union refuses, by this clause, to handle any 'hot goods' coming from 'unfair' employers:

> "Party of the second part reserves the right to its members to refuse to execute all work received from or destined for unfair employers. It is understood and agreed that the term 'unfair employers' as used in this section means unfair employers engaged in the printing or publishing industry, operating departments over which San Francisco Typographical Union No. 21 has jurisdiction. (Employing Printers' Assn. of San Francisco *and* San Francisco Typographical Union—Ind.).

"Sympathetic Strikes Against Competing Firms—This sympathetic strike provision covers only firms competing with the employer:

> "In case the United Office and Professional Workers of America are conducting a strike in a plant competing with this Employer, the employees of this Employer shall not be required to handle or work on products obtained from or designed for such competing employer. (R. L. Polk and Co. *and* United Office and Professional Workers—CIO)". p. 523.

APPENDIX D

SOURCE:

LABOR CONTRACT CLAUSES in the Automotive and Aviation Parts Manufacturing Industry, compiled and edited by Malcolm W. Welty, published by Automotive & Aviation Parts Manufacturers, Inc., 900 Michigan Building, Detroit 26, Michigan, 1945.

"602 (UE). No employee shall be required to do any work for any of the Company's competitors whose employees may be involved in a labor dispute. 'New Work' is defined as any order for work coming into the shop after the outbreak of a strike. However, the Union agrees that all work on hand of such of the Company's competitors that may be involved in a labor dispute shall be completed and the Union shall not interfere with the completion of such orders.

"603 (U). The Company agrees that should a controversy arise in regard to materials being brought into the plant from a strike-bound plant, settlement of such controversy shall be subject to negotiations between the Company and the Executive Shop Committee and there shall be no stoppage of work while negotiations for settlement are pending.

"604 (U). Machinery, tools and material used in strike-bound plants shall not be brought into this plant. Such items shall be received only with the sanction of the Union Bargaining Committee. Employees may refuse to deliver machinery, tools and material to any customer of the Company whose employees are on strike because of labor dispute.

"605 (U). Except for the duration of the War, employees may refuse to handle material which the Company purchases from any supplier while its employees are on a strike authorized by their Union. Drivers may refuse to deliver

goods to any customer of the Company whose employees are on strike because of labor dispute.

"606 (IA). It shall not be considered a violation of this agreement for employees to refuse to violate a picket line established by American Federation of Labor affiliates, or to refuse to work on work from plants where strike or lockout conditions prevail.

"607. (U). The Union may refuse to do work which the Company takes over from any employer in whose establishment a strike exists, which work would ordinarily be done at the establishment where the strike is in progress; it may also refuse to accept any material from an employer whose employees are on strike, provided the Company is given notice that such a strike has been approved by the International Office.

"The provisions of the above paragraph do not apply to work which may be essential to the National Defense.

"608 (U). The Management agrees that should a controversy arise in regard to materials, tools, etc., being brought into the plant from a strike bound plant, settlement of such controversy shall be subject to negotiations between the Management and Executive Shop Committee, and there shall be not stoppage of work while negotiations for settlement are in progress.

"609 (U). Employees may refuse to handle material which the Company purchases from any supplier whose employees are on strike because of a labor dispute. Drivers may refuse to deliver goods to any customer of the Company whose employees are on strike because of any labor disputes.

"610. (U). Should a controversy arise in regard to materials, tools, etc., being brought into the plant from a strike-bound plant, settlement of such controversy shall be subject to negotiations between the Company and the Shop

Committee, and there shall be no stoppage of work while negotiations for settlement are in progress."

(Chapter VI, GRIEVANCES AND GRIEVANCE PROCEDURE, C. Strikes and Lockouts, 2. Sympathetic Strikes or Other Sympathetic Action, p. 142-143.)

NOTE: The symbols UE, U, and IA refer to the United Electrical, Radio, and Machine Workers, the United Auto Workers, and the International Association of Machinists, respectively.

APPENDIX E

Illustrative Provisions in International Union Constitutions on Refusal to Handle Unfair or NonUnion Goods or Materials.

1. "Local unions in making contracts or wage agreements shall insert a clause reserving the right to refuse to execute all struck work received from or destined for unfair employers or publications."

   Source: Constitution By-Laws, General Laws and Convention Laws, as amended 1955, of International Brotherhood of Bookbinders.
   Section 73 Page 61

2. "Subordinate unions at all time have the right to define as struck work composition and mailing room work executed wholly or in part by non-members, and composition, mailing room, or other work coming from or destined for printing concerns which have been declared by the union to be unfair, after which union members may refuse to handle the work classified as struck work."

   Source: Book of Laws of the International Typographical Union, effective January 1, 1956.
   Art. III, Section 5 Page 112

3. "When an employer, involved in a properly sanctioned strike as hereinabove defined, shall cause the work which is normally performed by the striking members to be performed in other places of employment, whether owned or controlled by such employer or not, the International President shall order any members who shall be working in such other places of employment to cease performing such work, or to cease working in such other places. Such an order by the International President shall first be approved by the Executive Board, to entitle members complying therewith to strike or victimization donations. The International President shall

take such action as he shall deem appropriate against any members who shall refuse or fail to comply with this order to cease work, subject however, to a member's right to appeal, as provided for in Article 13, Section 4."

Source: International Die Sinkers' Conference Constitution, effective November 5, 1948.
Art. 9, Section 3 Page 22

4. "No further contracts shall be approved by the General Executive Board unless a clause stipulating that all circled heading and jointed staves purchased from outside sources bear the stamp of the Coopers' International Union.

Source: Coopers' International Union of North America, effective April 18, 1955.
Section 60 Page 19

5. "No member of this I. U. shall work for any person, firm or corporation which employs any non-union employee in any branch of the trades within the jurisdiction of this I. U., or work for any sub-contractor who takes a contract from any person or firm who employs any non-union employe in any branch of the trade composing this International Union, or work for any firm or person either directly or indirectly who has been placed on the unfair list by this International Union."

Source: Constitution and Rules of Order of the Bricklayers, Masons, Plasterers' International Union of America, effective October, 1954.
Art. XVIII Section 16 (2) Page 78

6. "When one craft has trouble and is forced to cease work to obtain a settlement and the firm operates their jobs with foreman or any other workman, all other crafts shall come to the aid of their brothers and sisters and cease work until the trouble is satisfactorily settled.

Source: Constitution, International and Subordinate Local Unions of the International Brotherhood of Operative Potters, AFL.
Section 123 Page 17

7. "Any firm or corporation manufacturing cement or plastering material whose solicitors or agents advise any owner, builder or architect to employ non-union labor, shall be classed as unfair to the O.P. &C.M.I.A., and it is within the right of the members of the O.P. & C.M.I.A. to refuse to work on any job where the unfair material is used within the jurisdiction of the International Association.

Source: Constitution of the Operative Plasterers' and Cement Masons' International Association of the U. S. and Canada, effective May 16, 1955.
Section 153 Page 70

8. "In case of a strike or lockout when the employer proposes getting his work made in a shop other than that in which the strike or lockout exists, the Executive Board may, if they deem it advisable, order the men to refuse to make the work. And when such order is issued it shall be the duty of the members to refuse to make the work. Members refusing to be governed by the order of the Executive Board will be liable to suspension or expulsion.

Source: Constitution of the International Molders and Foundry Workers Union, effective October 1, 1955.
Art. XV Section 169 Page 63

9. "Members of the Union shall refrain from working on ships diverted from a Port where a labor dispute exists between the I.L.A. and any of its subdivisions in connection with such ship, providing such dispute has been approved as provided herein.

Source: Constitution and Rules of Order of Interna-

tional Longshoremen, Ind. effective July 11, 1955.
Art. XXVI Section 23 Page 48

10. "Members of the Union shall refrain from working on ships diverted from a port where a labor dispute exists between the International Brotherhood of Longshoremen and any of its subdivisions in connection with such ship, providing such dispute has been approved as provided herein.

Source: Constitution and Rules and Order of The International Brotherhood of Longshoremen, A.F.L. effective July 26, 1954.
Art. XXVI Section 18 Page 45

11. "When an employer, involved in a properly sanctioned strike as hereinabove defined, shall cause the work which is normally performed by the striking members to be performed in other places of employment, whether owned or controlled by such employer or not, the International President shall order any members who shall be working in such other places of employment to cease performing such work, or to cease working in such other places. Such an order by the International President shall first be approved by the Executive Board, to entitle members complying therewith to strike or victimization donations. The International President shall take such action as he shall deem appropriate against any members who shall refuse or fail to comply with this order to cease work, subject however, to a member's right to appeal, as provided for in Article 13, Section 4.

Source: International Die Sinkers' Conference Constitution, effective November 5, 1948 and April 6, 1955.
Art. 9 Section 3 Page 22

12. "All contracts or agreements entered into by any subordinate union shall have a provision therein reserving

to the members of such subordinate unions the right to refuse to execute any struck work received from or destined to any unfair employing printer or publisher.

Source: Constitution and Laws of the International Printing Pressmen and Assistants' Union of North America, effective August 1952.
Art. XV Section 8 Page 48

13. "Local unions, in making contracts or wage agreements, shall insert a clause therein reserving to their members the right to refuse to execute all struck work received from or destined for unfair employing stereotypers, electrotype finishers, electrotypers, wax engravers, wax rulers, aluminumtypers and rubber and plastic printing plate manufacturers.

Source: International Stereotypers' and Electrotypers Union of North America, effective February 1956.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 273

NATIONAL LABOR RELATIONS BOARD,
PETITIONER

v.

GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 886, AFL-CIO,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR RESPONDENT

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NATIONAL LABOR RELATIONS BOARD,
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RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR RESPONDENT

THE FACTS

The facts of this case insofar as are relevant to this Respondent's presentation are contained in the Trial Examiner's Report (R. 26) as adopted by the Board (R. 62). They are briefly as follows:

At the time of the controversy which gave rise to the instant matter, Respondent was a labor organization known as General Drivers, Chauffeurs, Warehousemen and Helpers Union, Local No. 886, AFL-CIO (hereinafter referred to as the "Drivers' Union" or the "Union") whose members were employed by various motor vehicle carriers in the Oklahoma City area. Such members were employed both on the docks or loading platforms of the carrier and on the

carrier's trucks. The collective bargaining agreement between the Union and such carriers setting forth the working conditions of the carrier's employees, so far as the record indicates and for the purposes of this case, was entered into freely by both parties and for mutual considerations. That agreement contained a clause, common in the industry, under which it was agreed by the carriers that "members of the Union shall not be allowed to handle or haul freight to or from an unfair company . . ." (This type of clause is generally referred to as a "hot cargo," or "unfair goods," or "struck goods" clause, and will be referred to throughout this brief as a "struck goods" clause.) The term "unfair company" as used in the clause included companies engaged in a labor dispute and whose employees were on strike.

The American Iron and Machine Works Company, engaging in the manufacture of oil field equipment and doing business in the Oklahoma City area, became involved in a labor dispute with Lodge 850 of the International Association of Machinists, AFL-CIO (the petitioner in case number 324), and its employees who were members of that union went on strike. In the course of the strike, the struck employer attempted to make delivery of its products to the docks of various of the carriers whose employees were represented by the Drivers Union as indicated above. The delivery trucks were driven by American Iron nonstriking employees, and when they arrived at the docks were picketed by the Machinists Union.

Acting pursuant to the foregoing clause in the collective agreement between the carriers and the Drivers Union, that Union, on occasions when American Iron trucks appeared at the carriers' loading platforms to unload American Iron products for shipment, induced, instructed or encouraged, but did not coerce, its members employed by the carriers on the platforms (that is, those employees stationed on the docks engaged in loading and unloading

freight as distinguished from the drivers employed by the carriers to drive their vehicles) to comply with the "struck goods" clause by refraining from unloading the trucks. In addition, it was found by the Trial Examiner that the Machinists' pickets requested the loading platform employees who were members of the Drivers Union not to unload the American Iron trucks.[1] Such members employed by the foregoing carriers did refrain from handling American Iron freight.

All but one of the carriers, acting in disregard of their commitments and of the scope of employment of their employees as contained in the "struck goods" clause, requested but did not order the loading platform employees to unload the American Iron trucks. The members of the Drivers Union, choosing to assert their contractual rights, disregarded such requests upon the suggestion of their union representatives. At least one carrier (Leeway) did not seek to have its employees disregard the "struck goods" clause and made no request that American Iron freight be handled.

THE QUESTION PRESENTED

The question in this case is whether the agreement between the carriers and the Union, under which the carriers agreed that members of the Union shall not be allowed to handle freight from an unfair company, and the Union's action in inducing its members to conform to that agreement by refraining from handling freight from an unfair company, are proscribed by the National Labor Relations Act as amended, particularly by section 8(B)(4)(A) thereof.

ARGUMENT

Although four of the five members of the National Labor Relations Board participating in the decision of the Board

[1] The Machinists (petitioner in No. 324) deny making any such requests or that there was any evidence sufficient to warrant the Board's finding that such requests were made.

in this case either found or assumed that the "struck goods" clause of an agreement was in itself legal and proper, i.e., unions and employers were free under the Act to enter into such agreements, the Board nevertheless concluded that union attempts at enforcement by inducing its members pursuant to the agreement not to handle the freight of the American Iron Company constituted a violation of Section 8(b)(4)(A) of the Act. The Court below, in reversing the Board, determined that such union attempts at enforcement were permissible under the Act and, in addition, declared that the "struck goods" clause as such was legal under the Act. In its brief before this Court the Board has heavily argued the question of the validity of "struck goods" agreements as well as the question of their enforceability, and has attached to its brief a copy of the most recent decision of the Board, decided after writ of certiorari was granted in this case, in which a majority of the Board members for the first time found "struck goods" agreements to be invalid on their face. Since the Board apparently deems the issue of legality to be implicit in this case and a necessary prerequisite to a determination of the question of union enforceability, this respondent has undertaken in this brief to treat the issue of legality of "struck goods" agreements at length.

I

THE POLICY OF THE ACT RESPECTING "STRUCK GOODS" AGREEMENTS

A. The Nature and Function of the "Struck Goods" Agreement.

Since this case involves a question concerning the legality and enforceability under Taft-Hartley of so-called "struck work" or "hot cargo" agreements, it might be well at the outset briefly to outline the purpose and function of such agreements and the reasons why unions and employers see fit to enter into them.

These agreements customarily take the form of commitments by employers that they will not allow or require

their employees to handle, load or unload, or work on goods or products of other employers engaged in a labor dispute with those other employers' employees. The function and purpose of these agreements, their widespread and traditional use not only in the field of transportation but in American industry generally, and their role in stabilizing employment conditions and localizing labor disputes within an industry, are set forth in an Economic Brief filed by petitioner in support of this brief. It is the purpose of that Economic Brief to supply this Court with that information in order to assist in properly evaluating and resolving the issue of whether Congress intended or could have intended either to invalidate such agreements in their entirety or to render them unenforceable by the union parties thereto under Section 8(b)(4)(A) of the Act.

As more fully set forth in the Economic Brief, long prior not only to the Taft-Hartley amendments in 1947 but to the Wagner Act itself, employers, motivated by various reasons, often of self-interest, have sought to assist unions in their disputes with other employers by agreeing not to deal with or handle the goods of other employers engaged in a primary labor dispute.[2]

This was sometimes done by formal agreement and at other times on an *ad hoc* basis either by union request or by unsolicited action of the neutral employer. The National Labor Relations Board, at p. 40 of its brief before the Sec-

[2] Although immaterial to Section 8(b)(4)(A), it may be noted that such an agreement probably would not violate the Sherman Anti-Trust Act. *Allen-Bradley Co.* v *Local No. 3, I.B.E.W.*, 325 U.S. 797, 809 ("Employers and the union here did make bargaining agreements in which the employers agreed not to buy the goods manufactured by companies which did not employ the members of Local No. 3. We may assume that such an agreement, standing alone would not have violated the Sherman Act"); *Schatte v International Alliance*, 182 F. 2d 158, 167 (C. A. 9), cert. denied, 340 U.S. 827.

ond Circuit in the first court case involving the validity of such agreements—*Rabouin v. NLRB* (sometimes referred to as the *"Conway Express Case"*), 195 F. 2d 906—summarized a number of the considerations which may motivate an employer, with or without union request, to extend this type of cooperation to unions:

> "He may desire to aid the union lest substandard employment terms at the struck plant introduce undesirable competitive practices resulting from lower labor costs; the union may grant him a concession on other issues in exchange for his assistance; he may feel that preservation of harmonious relations with the union is preferable to doing business with the struck employer; or he may be convinced of the rightness of the union's cause."

The reasons motivating unions to enter into such agreements are set forth at length in the Economic Brief filed herewith. In brief summary, such agreements represent to union members a formalization of the principle upon which the organized labor movement of this country was founded and on which it has prospered, namely, the principle of mutual aid and assistance, of making common cause with fellow workers, and doing nothing to assist their adversaries. This principle finds place and expression in section 7 of the Act which specifically guarantees employees the rights "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection." Further, and even more important, such agreements, by reason of the impetus they give in organizing the unorganized, afford and have traditionally afforded a very helpful means of accomplishing "the objective of any national labor organization, . . . elimination of price competition based on differences in labor standards." *Apex Hosiery Company v. Leader*, 310 U.S. 469, at 503.

B. "Struck Goods" Litigation Before the Board and in the Courts.

As is indicated in the brief filed by the National Labor Relations Board herein and, in particular, by the concurring and dissenting opinions of the various Board members in the Board's latest decision dealing with the "struck goods" issue—*Truck Drivers Local 728 and Genuine Parts Company*, 119 NLRB No. 53 (attached to the Board's brief as Exhibit "B"), the status of the "struck goods" agreements under the National Labor Relations Act has had a tortuous history. Beginning with the Board's decision in the *Conway Express* case (*Teamsters Local 294 and Rabouin*, 87 NLRB 972), the Board for a number of years considered the "struck goods" agreement both valid and enforceable under the Act. However, commencing with the appointments to the Board which took place beginning in 1952, an about-face process began to take place. The first step was taken in the *McAllister* case, 110 NLRB 1769, where a majority of the Board found such agreements to be valid, but enforceable by the union only if the employer party to the agreement desired to abide by its commitment. The next step was taken in the *Sand Door* case (*Local 1976, United Brotherhood of Carpenters*, 113 NLRB 1210, enforced, *sub nom. National Labor Relations Board v. Local 1976, United Brotherhood of Carpenters, 241 F. 2d 147*, cert. granted October 14, 1957, No. 127, this Term), and in the present case, where a majority of the Board held that such agreements, though not proscribed by the Act, could not be enforced by the union by appeals to its members to observe the terms of the "struck goods" clause, and this even though the employer did not seek to repudiate the agreement and was willing to permit his employees to refuse to handle struck goods. The wheel came full circle in the *Genuine Parts* case, *supra*, decided after writ of certiorari was granted in the instant case, where a majority of the Board, though by different processes of rea-

soning, held that all "struck goods" agreements are both invalid on their face and unforceable by their terms.[3]

The path of "struck goods" agreement litigation in the courts, while less tortuous, has similarly been marked with a variety of opinions. Although no court has declared the agreement invalid on its face, at least two circuits (the Second in *Conway* and *Crowley Milk*[4] and the District of Columbia in *American Iron* have expressly affirmed both their validity and enforceability, and only one circuit (the Ninth in *Sand Door*) has agreed with the present Board majority that such agreements are unenforceable by the union parties to them.

C. The Contentions of the Board.

The Board, in its brief herein, advances two principal arguments. Its first contention, and one basic to all of its arguments, is that in enacting Section 8(b) (4) (A) Con-

[3] Since 1952 the decisions dealing with such agreements have all been noted for the variety and contrariety of the opinions rendered by the various Board members who then happened to hold office. Perhaps one can be pardoned for wondering in what regard the principal of administrative expertise can be held when the deciding vote on the concept of total illegality, as announced in *Genuine Parts*, comes from a Board member whose "10 years of experience with the cases involving hot cargo" (Appendix "B" to Board Brief, p. 89) is actually based on four months' experience as an administrator and 9½ years as an advocate for employers, including numerous motor freight carriers, and when at no time since 1952 have more than two Board members been able to see eye to eye on any single aspect of "hot cargo" validity or enforceability. The Second Circuit in the *Crowley Milk* case *(Milk Drivers Union v. N.L.R.B.*, 245 F. 2d 817, pending on certiorari *No.* 412, this Term, stated in this respect as follows:

> "This is not the occasion for reversing ourselves in deference to administrative expertise, for the legal question is one of legislative intent and statutory construction as to which the courts are fully competent and, indeed, have the ultimate responsibility. Moreover, the present issue has divided the agency into three fragmentary views which seem to be still in the process of development."

[4] For the convenience of this Court a copy of the decision in *Crowley Milk* is attached to this brief as Appendix "A".

gress desired to protect not only the innocent third party neutral against forced, i.e., strike-induced, involvement in the labor disputes of others, but in addition, Congress desired to protect the general public and other employers, (including employers engaged in the primary dispute) who use, sell, transport or handle the boycotted goods from the effects of any refusal to handle or work on struck goods. From this premise, the Board then argues both the illegality of any attempt to bargain away the protection of others, as well as for an expanded reading of Section 8(b) (4) under which any union induced refusal to handle freight, even though pursuant to a struck-goods clause, is proscribed, and this regardless of whether the particular employer has acquiesced in such refusal. Thus, the Board, while arguing the illegality of "struck goods" agreements on their face, also argues that regardless of their legality, any union attempt to enforce them by requesting or inducing its members to refrain from handling struck goods constitutes a violation of the terms of Section 8(b) (4) (A), as such terms are construed by the Board.

We repeat, however, that fundamental to all of the Board's conclusion respecting illegality or unenforceability of the "struck goods" clause is its major assumption that Congress intended to protect many others in addition to the reluctant neutral—indeed, that Congress intended to protect not only that neutral but all who might be affected by the refusal of that neutral's employees to handle goods. Recognizing this premise as the keystone to its entire argument, the Board has striven mightily to give it support. It is submitted that the Board has fallen far short of establishing that premise; on the contrary, when it is seen what the Congress has actually done in Section 8 (b) (4) (A) and elsewhere in the Act, what it has directly or indirectly refrained from doing, and what its debates and Reports demonstrate concerning its intention, it will be plain that Congress neither intended nor by its use of language ac-

complished the broad objectives ascribed to Section 8(b)(4)(A) by the present majority of the Board.

D. The Language of the Act Does Not Indicate Any Intent to Protect the Public Generally from Secondary Boycotts and Their Effects But Only to Protect A Neutral Against Strike Action to Force That Neutral to Boycott Someone Else.

Let us start with the language of the Act to see what the Congress actually has done as opposed to what it may be speculated it intended to do. If it was indeed the intent of Congress, aware of the prevalence of "struck goods" agreements in American industry, to protect all persons who might be adversely affected by their use, it could be assumed that the Congress would use precise language to accomplish that object. Thus, the "struck goods" agreement could have been outlawed in so many words, as was the closed shop and all other forms of union security agreements by Section 8(a)(3) of the Act. That Congress did not do so directly—that there is no language proscribing the "struck goods" agreement as such—is of initial significance.[5]

It is also of significance that Congress did not use direct and easily available language to interdict the forcing or requiring of persons other than the third party neutral from ceasing to do business with someone else. For instance, had it actually desired to protect not only against involuntary involvement of neutrals by preventing strike action against them, but also against involvement of other employers or individuals such as customers who might be indirectly affected, although no strike was directed against them, it

[5] Since, as indicated by this Court in *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342 at 346, Congress in enacting legislation in the field of labor relations intended "to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement of the United States", and since the making of hot cargo agreement was a traditional and integral part of that bargaining, there is all the more reason to suppose that Congress would have used express language of prohibition had it indeed intended to proscribe that type of agreement.

could easily have done so simply by adding another subsection to Section 8(b) which would spell out in so many words a prohibition against either union or employer boycott activities which caused interruptions in the business of any third parties affected by the boycott. Or, perhaps more succinctly, it could merely have added the following italicized language to subsection (A): "Forcing or requiring *that or any other* employer or other person to cease handling etc." Congress did just that when it did desire to protect other third parties not being directly struck as in subsection (B) where it expressly stated that it shall be an unfair practice to induce the employees of any employer to strike where an object is "forcing" or requiring *any other employer* to recognize or bargain with a labor organization . . . unless such labor organization has been certified . . . "

The Board argues (Board Brief, p. 37) that the term "or other person" in the phrase "forcing or requiring any employer or other person to cease doing business with another," as contained in Section 8(b)(4), indicates an intent to shield others than the third party neutral employer. As we shall see the legislative history of the Act does not support this conclusion, and we suggest that it is more reasonable to assume that the term "other person" was used so as to include third party neutrals who might not be embraced under the Act's definition of "employer." (Sec. 2(2)), such as, for instance, sole proprietors having no employees on their payroll. If the Board's construction of the phrase "other person" as used above is adopted, namely, that it includes any third party affected by a boycott, then every strike would be outlawed because any strike has the effect of forcing some employer or "other person" to cease dealing in the products of, or doing business with some other person. But this court has indicated that Section 8(b)(4) cannot be read or applied literally and without reference to purpose, and that neither that section, nor the Act itself was designed to interfere with the right to strike

or picket a primary employer in a primary dispute. (See *NLRB v. International Rice Milling Company*, 341, U. S. 665; *Di Giorgio Fruit Corporation v. NLRB*, 191 F.2d, 642, certiorari denied 342 U. S. 869). On the contrary, Section 7 of the Act, as well as Section 13, broadly protects the right to engage in striking, picketing and other concerted activities, and it is only to the extent specifically and narrowly prescribed elsewhere in the Act, as in Section 8(b)(4), that such protection can be "diminished in any way." Sections 13 and 7 clearly call for a broad construction of their provisions and a narrow construction of Section 8(b)(4) so as to save wherever possible the right to strike, picket and engage in concerted activities for mutual aid and protection.

Not only did Congress not use language apt to accomplish what the Board contends was Congress' broad purpose, the language it did use in section 8(b)(4)(A) is very narrow and indicates on its face no broad objective of protecting all who might be affected by a refusal to handle the goods of a struck employer, but rather an intention only of protecting against involuntary (strike-induced) involvement of neutrals in the disputes of others—the forcing, through strike action, of third parties to boycott someone else.

Section 8(b)(4) in relevant part reads as follows:

> "It shall be an unfair labor practice for a labor organization or its agents * * * to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to . . . handle or work on any goods . . . where an object thereof is: (A) forcing or requiring . . . any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;"

From either a careful or a casual reading of the above language it is clear (1) that the section is directed against *unions* only and proscribes only a certain type of *union* activity in the secondary boycott field as distinguished from any *employer* activity in that field, and (2) that the only type of such union activity which is proscribed is the act of *striking* a neutral employer (or inducing the employees of the neutral employer to *strike*) in order to cause *that* neutral employer to cease doing business with another (usually the primary) employer. In other words, Section 8(b)(4)(A), by its clear terms, deals only with the *involuntary* (strike-induced) involvement of neutrals in labor disputes of other employers, and the only activity which is actually proscribed is *the forcing by strike action* of a particular employer to boycott someone else. No stretching of the language of the section can produce a prohibition against the act of a neutral *employer* in ceasing to do business with or handle the products of another employer when such act is voluntary or even when it is brought about through a union by any means other than coercion through actual strike action or inducement of a neutral's employees to strike.

If Congress had intended Section 8(b)(4)(A) to have the broad scope contended for by the Board, surely it would have used language which was less narrow than the carefully confined phraseology of Section 8(b)(4)(A). Basic to this entire case is the plain fact that in Section 8(b)(A) Congress has *not* proscribed voluntary employer assistance to unions engaged, as here, in a legitimate labor dispute, and has *not* attempted to outlaw anything other than the use of strike actions against a neutral employer to compel that particular employer not to deal with some other employer. That being the case, the Board cannot be heard to argue that under a "struck goods" agreement the parties are attempting to agree to something which the Act prohibits, or by indirection, to avoid some plain mandate in the Act.

E. The Legislative History of the Act as Well as What Congress Has Refrained from Doing Indicate No Broad Intent to Protect the Public Generally from the Effects of Boycotts.

1. The Legislative History.

As indicated by the Second Circuit in the *Crowley Milk case*, it is doubtful, in view of the clear language of Section 8(b) (4) (A), whether resort to legislative history to determine its meaning is appropriate. Even if it were, examination of that history in no way supports any contention that section 8(b) (4) (A) was designed to protect members of the public, customers and others that might be affected by a Union-induced refusal to handle goods, or that Congress intended to protect against anything but the forced involvement of neutrals in the boycotting of others accomplished by strike action against that neutral. A detailed examination of that legislative history has been made in the brief amicus curiae filed by the AFL-CIO, and therefore will not be attempted here. Suffice it for present purposes to state that that history demonstrates that Congress, under Section 8(b) (4) (A), intended to outlaw only one type of "secondary boycott," and that is the type of boycott, usually called an "employer boycott" under which union members strike a neutral employer to force him to cease doing business with or handle the products of some other employer, normally an employer engaged in a primary dispute.*

The constant reference made by Senator Taft and other floor leaders to the term "secondary boycott" without at-

*An employer boycott by a union, i.e., boycott of an employer because of his "unfair" activities, is to be distinguished from a consumer boycott under which a union induces its members and sympathizers to refrain from purchasing from or patronizing "unfair" employers. Even as to the employer boycotts Congress did not intend to outlaw all employer boycotts—it intended to outlaw only those which were effectuated through strikes or partial strikes against neutral employers. The references to the legislative history of the Act in *N.L.R.B. v. International Rice Milling Co.*, 341 U.S. 665-673, and accompanying footnotes, and in *Douds v. I.L.A.*, 224 F. 2d 455 (C.A. 2), make this point clear.

tempt at definition, must be taken in the light of the commonly understood and indeed court-defined definition of the term, as describing a situation where coercion against an unwilling third party is used to effect the boycott. See *Duplex Company v. Deering*, 254 U.S. 443 at 466, where secondary, as distinguished from a primary boycott, is defined as consisting of "a combination not merely to refrain from dealing with complainant, or to advise or by peaceful means persuade complainant's customers to refrain ('primary boycott'), but to exercise coercive pressure upon such customers, actual or prospective, in order to cause them to withhold or withdraw patronage from complainant through fear of loss or damage to themselves should they deal with it." Further discussion of the meaning of the terms "secondary boycott" and "employer boycott" is contained in the Economic Brief filed herein.

What the Board has done in its discussion of the legislative history was to attempt to assimilate the "struck goods" clause with a "secondary boycott" and then, because of the undoubted legislative aversion to the secondary boycott, assume that in outlawing the latter the hot cargo agreement was also outlawed. But there is no basis for thus grouping the two concepts; on the contrary, it is clear from the legislative history as a whole that the only type of "secondary boycott" with which Congress was concerned was the secondary boycott involving a *strike or partial strike* against some innocent third party neutral, under which that neutral *was forced* to cease doing business with some other person. See particularly, in this regard, the language of Senator Taft, set forth on page 23 of the Board's brief, where he refers to the chain reaction of *strikes* generated by the secondary boycott principle (83 Congressional Record, 4198, 2 Legislative History, 1107). The distinction drawn by the bill and by Section 8(b)(4), said Senator Taft, is between "*strikes*" for justifiable purposes and *strikes* for wholly illegal and improper purposes" such as "*strikes* in the nature of secondary boycotts" (93 Cong.

Rec. 3834, 2 Leg. Hist., 1005-1006). Summing up upon the bill's return from conference, he said (93 Cong. Rec. 6445-6446 in 2 Leg. Hist. 1544):

> "The conferees rejected the broad prohibition of all kinds of *strikes* . . . The only *strikes* which are declared to be illegal are secondary boycotts and jurisdictional *strikes*." (Emphasis supplied)

As stated by the Second Circuit in the *Crowley Milk* Case, supra (245 F. 2d at 822):

> "We also do not accept the argument that hot cargo clauses are against public policy. The advocates of this view ignore the statutory language to talk about "secondary boycotts" and the undoubted Congressional dislike of them. Having assumed that refraining from work described in a hot cargo clause is a "secondary boycott," they frame the issue in terms of whether a hot cargo clause is a defense to a Section 8(b) (4) unfair practice. We cannot agree with this characterization of the issue. There is no need for a "defense" unless there has been a violation; and in determining the latter question we look to the statutory language, rather than the vague concept "secondary boycott," about which the legislators sometimes talked, but which they did not write into the Act. For the reasons already given we hold that there is no "forcing," "requiring," "concerted refusal in the course of their employment," or "strike," and consequently no violation."

In view of the widespread and traditional use of these agreements throughout American industry, as set forth at length in the Economic Brief filed herein and as noted by the Board in its brief (pp. 26-30), and in view of the fact as further noted by the Board that the Congress must have been aware of the operation and effect of these agreements, it can reasonably be assumed that if Congress actually intended to proscribe them or restrict their use in any way, it not only would have given the matter considerable study and consideration, but also would have somewhere made specific reference to the fact that either Section 8(b) (4) (A) or some other section was designed to curtail the

use of such agreements. Yet the most significant feature of the legislative history is that nowhere in the statements of the leading Congressional proponents or opponents of Taft-Hartley or in any of the Senate or House Committee Reports thereon is there any express mention whatsoever made of the "struck goods" agreement as such, let alone any indication of an intent to outlaw or proscribe the use of these agreements or to render them unenforceable. Whatever reference to "struck goods" agreements or their use the Board has set forth in its brief (see particularly pages 23, 24) comes solely from witnesses hostile to labor and obviously prove nothing; if testimony of that nature can constitute proof of legislative intent, a basis could be found for outlawing almost all union activities. The Board cites the situation in the *Allen-Bradley* case (*Allen-Bradley Company v. Local Union No. 3*, 325 U.S. 797) as involving an element of employer consent. While that may be true, the situation there was far different from the situation where the employer has a greed to a "struck goods" clause to help a union cause. In *Allen-Bradley* the employers themselves were engaged in activities in violation of the Federal Anti-Trust Laws, and the union simple joined them so as to become a party to the conspiracy. In that case the employers agreed not to buy out-of-town goods, and the union agreed in turn not to install them, with the effect of giving the local contractors a monopoly on installation of the products involved. In *Allen-Bradley* this Court pointed out that if the goods shipped from out of state had not been installed as a result of a contract in which the employers agreed not to *buy* goods manufactured by companies which did employ members of Local 3, the non-installation of the goods would not have been illegal. Clearly, Section 8(b)(4)(A) does not make such a contract illegal. Therefore, it is obviously not true that Congress in Section 8(b)(4)(A) outlawed the abuse which it found in *Allen-Bradley*, if the abuse is regarded as non-installation of goods produced elsewhere as a result of

an agreement between the employer and the union. Just as Congress did not seek to reach restraints of trade which result from agreements between an employer and the labor organization representing his employees where those restraints are effectuated by non-purchase of the primary employer's goods, so did it not seek to reach restraints accomplished by non-installation, where the non-installation occurs pursuant to an agreement between the employer and the union representing his employees. In other words, Congress under Taft-Hartley totally eschewed the anti-trust approach which deals with restraints effectuated by agreement between a secondary employer and his employees, and restricted its prohibition to the anti-secondary strike approach.

2. What Congress Has Refrained from Doing.

Final and perhaps most conclusive evidence that Congress did not intend to proscribe "struck goods" agreements or their use is found in what Congress has specifically refrained from doing.

The discussion of the legislative history of the Act by the Second Circuit in the Conway case (Rabouin v. NLRB, 195 F. 2d 906, at 912) discloses that Congress expressly rejected a proposal to proscribe attempts by unions to involve neutrals by direct approach to the employer, as distinguished from his employees, i.e., to induce that employer by threat of strike action to boycott some other employer engaged in a primary dispute. Consistent with that legislative history, and with the express language of 8(b) (4) (A), the Board has repeatedly held in other cases that unions are free to seek to induce neutral *employers*, by any and all means, even including threat of strike action, to aid a union cause by refusing to handle or process the goods of another employer engaged in a labor dispute or by ceasing to do business with such other employer, and this reading of the Act has been universally upheld by the courts. *Sealright Pacific, Ltd.*, 82 NLRB 271; *Lewis Karlton d/b/a*

Consolidated Frame Company, 91 NLRB 1295; *Local Union 878, International Brotherhood of Teamsters, etc. (Arkansas Express, Inc.)* 92 NLRB 255; *Schatte v. International Alliance*; 182 F. 2d 158 (C.A. 9), cert. denied 340 U. S. 827; *Rabouin v. NLRB*, 195 F. 2d 906; *NLRB v. Electrical Workers, CIO*, 228 F. 2d 553 (C.A. 2), decided December 22, 1955.

In an effort to counteract the foregoing rule of law and, even more to the point, in an effort to outlaw in their entirely "struck goods" agreements, Senator Schoeppel of Kansas on February 15 1954, introduced a bill in the Senate to amend Section 8(b) (4) of the Act to accomplish those results. After extended discussion (see Cong. Rec. for May 6, 1954, p. 579), the Senate refused to take action. A similar bill (S. 3842) introduced by Senator Curtis of Nebraska on May 14, 1956 (84th Cong., 2nd Sess.) likewise met with no response from the Senate. Under such circumstances, the remarks of this Court in *United States v. International Boxing Club*, 348 U. S. 236 at p. 244, in respect to the significance of a similar legislative attempt to extend the coverage of the anti-trust laws are applicable:

> ". . . No further action was taken on any of the bills; Congress thus left intact the then-existing coverage of the antitrust laws. Yet the defendants in the instant case are now asking this Court for precisely the same exemption which enactment of those bills would have afforded. Their remedy, if they are entitled to one, lies in further resort to Congress, as we have already stated. For we agree that 'Such a broad exemption could not be granted without substantially repealing the antitrust laws.'"

See also the recent Supreme Court decision in *United States v. Bergh*, 352 U. S. 40, at 46 where it was held at:

> ". . . It is of importance to note that several efforts were made to repeal this interpretation by specific Act of Congress, but in each instance the bill failed to pass. This contemporaneous interpretation . . . *together with acquiescence of the Congress, must be given great weight.*" (Emphasis added.)

If, as contended by the Board, Congress was really concerned with protecting the public interests by eliminating disruptions to commerce and to the business operations of persons other than the struck neutral resulting from the termination of business dealings between such neutral employer and the primary employer, a number of very pertinent questions come to mind. The following are examples of the type of question which the Board has not and cannot consistently reconcile with its concept of the broad objectives of Section 8(b)(4)(A), and it is submitted that unless it can do so, the premise basic to its entire argument must collapse:

1. Why did Congress vote down provisions of the House bill (H. R. 3020, 80th Cong. 1st Sess.) which would have made it unlawful for unions to cause such disruptions by threats of a strike directed against a neutral employer himself?

2. Why did Congress leave unions free to attempt to induce customers of neutral employers to boycott the neutral for the purpose of forcing the neutral to stop dealing with the primary employer? *NLRB v. Electrical Workers, CIO, supra; Brewery & Beverage Drivers v. NLRB; (Washington Coca-Cola case)*, 220 F. 2d 380.

3. Why did not Congress by express and easily available language interdict the *voluntary* as well as the involuntary refusal on the part of neutrals to deal or do business with other employers engaged in separate labor disputes?

4. Why did not Congress directly outlaw the "struck goods" agreement as it directly outlawed the closed shop agreement under Section (8)(a)(3)?

5. Why did Congress, as recently as its 84th Session, refuse to deal with "struck goods" situations specifically brought to its attention?

6. Why did Congress in Section 8(b)(4)(B)[7] permit even a strike against a neutral for the purpose of bringing pressure on some other employer to recognize or bargain with the union in a situation where the union had been duly certified under the Act?

7. Why did Congress enact a proviso to Section 8(b)(4) of the Act[8] which, as stated by this Court in *NLRB v. Rockaway News Supply Company*, 345 U.S. 71, at 80 "clearly enables contracting parties to embody in their contract a provision against requiring an employee to cross a picket line, if they so agree"? While the proviso deals with a subject different from "struck goods" agreements—namely, the right of individuals acting on their own to respect picket lines established at another employer's premises—nevertheless, the implications of thus allowing an employer to make an agreement to that effect are significant. For what is the difference in either principle or effect on other third parties between an agreement by a carrier and the union representing his employees, permitting those employees to refuse to cross a picket line at a struck plant while in the process of picking up or delivering products thereto (sanctioned by the principle enunciated in *Rockaway* above), and an agreement between a carrier and the union representing that carrier's employees permitting those employees to refuse to accept goods delivered from

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[7] Subsection (B) reads as follows:

"(B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees *unless* such labor organization has been certified as the representative of such employees under the provisions of section 9;" (Emphasis added.)

[8] That proviso reads as follows: "*Provided*, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act."

a struck plant when a picket line has been established around the struck plant's truck (the *American Iron* situation in this case)? Unless it can be said that there is a distinction between refusing to cross a picket line to pick up goods at a struck plant or refusing to cross a picket line to pick up goods off one of that plant's trucks, the factual situations in the foregoing instances are identical, and in any event the resulting effect of the refusal on the public and other customers is the same.

8. Why did not Congress make some exception to the provisions of Section 301 of the Act to avoid the consequences of the right that section gives a union *(UE v. General Electric Corporation* 353 U. S. 547) to obtain enforcement of the terms of their collective agreements by suits in the nature of specific performance? The Board has at times (see page 21 of its brief before the 9th Circuit in the *Sand Door* Case) suggested that unions would still have the right to go to court to obtain enforcement of their hot cargo clauses, even if the union has no right to attempt to obtain such enforcement directly by inducing its members not to handle struck goods pursuant to the "struck goods" clause.

In all the foregoing eight situations, as far as the public is concerned, or as far as the customer of the primary employer is concerned, or as far as the operation of the business of other third parties, directly or indirectly affected by the refusal to handle goods of a struck employer, is concerned, the effect is the same. That is, the flow of commerce between the neutral and the primary employer is disrupted, and business operations of persons dealing with the neutral or the primary employer are interfered with, to exactly the same extent whenever the neutral ceases to do business with the primary employer, whatever the reason for the neutral's cessation of such business may be. Surely, if Congress intended to protect the general public from the consequences of a neutral's refusing to do business

with the primary employer, all of the above examples of permissible secondary involvement would have been outlawed, and surely the failure of Congress to take preventive measures in the above situations does not reveal the broad concern with the public interest contended for by the Board.

While the Board admits that a neutral employer is free to refuse to deal with or otherwise boycott other employers as a means of helping the union engaged in a dispute with that other employer, it nevertheless argues (Board brief, p. 51, quoting from the decision of the 9th Circuit in *Sand Door*, 241 F. 2d, at 153) that in such a case the employer's decision is voluntary so that an entirely different situation is presented when the union attempts to influence the employer's decision by a work stoppage. In the latter case, the Board argues, "There would be little chance that the union's boycott demand would succeed, with the resultant impact on other parties which Congress sought to avoid, if the union were unable to back up its demand on the employer by threat of work stoppage." But if it was the purpose of Congress to permit a neutral's decision to boycott another employer to remain free from union pressure, why did Congress deliberately choose not to outlaw a threat of strike against a neutral to force him to boycott? Certainly, such threats could constitute the severest form of pressure. And, aside from this inconsistency, it is inconceivable to suppose that if Congress were truly seeking to protect members of the public who might be affected by a boycott and not just the innocent neutral, it would have limited that protection so closely, or have drawn a distinction so hairline, so as to make illegal only the one narrow activity where the Union approaches the neutral's employees directly, leaving all other employer boycotts permissible—even those forced by threat of strike.

The argument that the Act was not so much intended to protect neutrals as it was to protect the general public "in the public interest" from the consequences of boycotts is obviously not borne out by the legislative history or by

the vast areas of boycott activity which Congress has left untouched. For this reason any quotations from the legislative history or from the Act itself, indicating that the Act was passed "in the public interest," prove nothing. All provisions of the Act were, of course, passed "in the public interest," but the language of Section 8(b)(4)(A), its legislative history, and what Congress has refrained from doing indicate that Congress deemed antithetical to the public interest only strikes against neutrals or inducements of a neutral's employees to strike for the purpose of forcing that neutral to boycott someone else.

II.

THE TERMS OF SECTION 8(b)(4)(A) AS APPLIED TO THE UNION ACTIVITIES IN THIS CASE

A. The Union's Activities in This Case Do Not Constitute a Violation of Section 8(b)(4)(A) Properly Construed.

1. The Implications of the Board's Argument.

We come now to the second of the Board's two major arguments, namely, the argument that if the provisions of Section 8(b)(4)(A) are construed broadly (as is required to accommodate the broad purpose of that section to protect the public generally), then the actions of the Drivers' Union in inducing its members to refrain from handling American Iron freight constitute a violation of that section, and this regardless of any employer acquiescence in such inducements or of any desire on the part of the employer to live up to his agreement not to allow his employees to handle struck goods. To agree with that argument involves acceptance of the Board's major premise of a Congressional purpose to afford over-all public protection against product boycotts. It also involves, as will be seen in the remaining portion of this brief, acceptance of an interpretation of the clear phraseology of Section 8(b)(4)(A) so twisted and tortured as to bring to mind the admonition

of this court in *NLRB v. Rockaway News Supply Company*, 345 U. S. 71, at 75, that "Substantive rights and duties in the field of labor management do not depend on verbal ritual reminiscent of medieval real property law." Finally, acceptance of that argument in the face of the element of employer acquiescence requires a willingness to disregard all common law and ethical concepts of the mutuality of contract obligations, and to ignore a basic purpose of the Act itself to foster and protect the collective bargaining agreement.

Let us first examine the implications of the Board's argument that the hot cargo clause in a collective agreement may be disregarded at will by the employer party thereto, and ever where that employer may desire to maintain the agreement, the union cannot be permitted to enforce it, at least by appeals to the union member beneficiaries to observe its terms. Heretofore in this brief, we have talked much of the validity of the "struck goods" agreement as such. But regardless of whether the question of validity is implicit in this case, and its resolution a necessary precedent to resolution of the question of union enforceability, *it must not be forgotten that this case is presented in a posture which assumes the validity of "struck goods" agreements as such and the right of unions and employers to enter into them under the Act.*[9] The actual holding of the Board here is that, regardless of the validity of "struck goods" agreements, it is unlawful for a union to attempt to obtain the benefit of that agreement by telling its members that "struck goods" are being delivered which they are under no obligation to unload, and this even though the employer involved is willing to fulfill his own commitments

[9] At the time of the Board's decision herein, all members but one agreed that "struck goods" agreements were valid, although at the present time, and since the decision of the Board in the *Genuine Parts* case, *supra*, only two of the Board's five members would hold such agreements to be legal.

not to allow his employees to unload. Thus, this Court is asked to subscribe to a doctrine under which an otherwise valid commitment, made in the give-and-take process of collective bargaining and for which a valuable consideration was presumably given and important concessions presumably made, can become unenforceable and a dead letter if the union for whose benefit the commitment was given asks its members to receive those benefits.

What the Board has really done in this case is to say that the employer is free to repudiate the very collective agreement which it is the purpose of the Act to encourage and protect. Section 1 of the Act declares it to be the policy of the United States to encourage "the practice and procedure of collective bargaining" and to protect "the exercise by workers of full freedom of association . . . for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." Section 7 of the Act grants employees the full right "to bargain collectively" through their chosen union and "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 301 of the Act provides special procedures for the enforcement of collective agreements, including their enforcement by specific performance. See *U.E. v. General Electric*, 353 U. S. 547. Can the Board's position in this case possibly be reconciled with these express declarations of the Congressional purpose to foster, protect and provide for the enforcement of agreements arrived at between unions and employers through the process of collective bargaining?

Board Members Murdock and Peterson, in their dissent in *Sand Door, supra,* commented on this concept of the sanctity of collective agreements under the Act as follows: "A contract does not consist of words on a piece of paper. It is a binding agreement between the contracting parties that requires them to behave toward each other in a specific

manner under a given set of circumstances, present or future."

The Board's concept of union unforceability of otherwise valid agreements, shocking as it is, is not made the less shocking by the suggestion that unions would have a remedy by suit for breach of contract in the state or federal courts. It is difficult to understand how a Board to whom Congress has assigned the task of smoothing the path of industrial relationships by the encouragement of collective bargaining can relegate such relationship to the processes of court litigation. A court of law is the very last forum where management and labor should seek to carry on their day-to-day relationships if industrial peace, harmony and cooperation are to be achieved. It is unthinkable that the Board's doctrine should be seriously contended for in any area of contractural relationships, but it is even more startling that it be contended for in the area of contract relationship growing out of collective bargaining. Perhaps more than anywhere else it is important in the field of industrial relations that the parties have complete confidence that their respective pledges will be lived up to as agreed upon.

Union contracts today are the product of many hours at the bargaining table, where each clause is agreed to only after much give and take between the parties, and for which valuable concessions are made. In the case of "struck goods," who knows what concessions in wage rates, conditions of employment, or health and welfare benefits may have been made by the union in order to obtain agreement? It can safely be assumed that they were substantial. Yet, the Board would allow, indeed encourage, the employer to repudiate this portion of the collective agreement at will. It is submitted that the Board, in so doing, acts in entire disregard of the most basic principles of fair play and mutuality of obligation and proceeds in entire

disregard of the declared purpose of the very law under which it purports to act.

Board Members Murdock and Peterson, dissenting in *Sand Door, supra*, 113, NLRB 1210, at 1224, characterized the Board's position as follows:

> "The decision of Chairman Farmer and Member Leedom encourages employers to violate their lawful agreements with labor organizations. Indeed it tells them that they may freely take whatever the union has given in collective bargaining to secure such an agreement without fear of ever having to pay the *quid pro quo*. It repudiates for an employer a voluntary agreement that he has never repudiated himself. It forbids a union, under penalty of the Board's injunctive processes, to assume that the employer meant what he said when he agreed in advance that his employees would not have to handle nonunion material. Such a decision gravely and adversely affects the collective bargaining process, which it is the duty of this Board to promote and encourage. In this respect, it does not serve the general welfare and does not effectuate the intent of Congress to minimize strife and establish peaceful collective bargaining in the field of labor relations."

Could Congress possibly have contemplated such preposterous results? One district court, passing upon a similar contention respecting union enforceability of "struck goods" agreements had no hesitancy in answering with an emphatic "no":

> "If the contracts are legal, it would be a paradox to hold that the unions are liable for damages for negotiating them and must respond under Section 187. If the contracts are legal, then there is no merit in a claim that the members of a union working under them cannot rely and act on their terms when the occasion contemplated by the contract term arises." (*Meier & Pohlmann Furniture Co. v. Gibbons* (D.C.), 113 F. Supp. 409, affirmed 233 F. 2d 296.)

The court below had the following to say concerning this aspect of the Board's argument:

> "If the hot cargo clause is not violative of Section 8(b)(4)(A), and we think it is not, such a ruling would in practical effect render nugatory the clause itself and would leave the employees without adequate remedy. * * * We are not impressed with the argument that other adequate remedies are open to the employees of the union. Such remedies as are suggested by the Board seem to us to be totally inadequate and not such as are contemplated by the agreement by the employer in the hot cargo clause. * * * It seems to us that the purpose of Section 8(b)(4)(A) is to prevent injury to secondary employers in the disputes of others in which the secondary employers are not involved, and to prevent the forcing of such employers to stop doing business with a third person. But, in cases like this one, the secondary employer has agreed, as part of its bargaining contract with its own union, not to handle goods of an unfair employer; and it would seem that Teamsters employed the only effective means in its power to enforce the agreement."

The only justification which the Board advances for its concept of the sanctity of the collective agreement is that enforcement of the "struck goods" clause, even with the full consent of the employer party thereto, would impinge on the rights of other third parties, such as customers, which rights Congress has sought to protect—a protection which neither of the contracting parties can waive—so that, as a matter of public policy, the union must be forbidden to attempt enforcement. We have seen that this assumption of what Congress intended is without validity and, absent that assumption, the Board's justification must collapse.

2. *The Elements of an 8(b)(4)(A) Violation.*

We turn now to the Board's argument (Board brief, p. 40 et seq.) that Section 8(b)(4)(A) must be construed and applied broadly, even beyond its literal terms, in order to accommodate what the Board deems to be the intent of

Congress to protect all persons from the effect of union-induced boycotts, and that, so construed, the particular activities of the Drivers' Union in the instant case constitute a violation of Section 8(b)(4)(A). In substance, the Board asserts that the element of the neutral employer's coercion or non-consent need not be present in order to find an 8(b)(4) violation; that any direct inducement by a union of union members not to handle "struck goods," even though with employer consent, is sufficient to establish the violation. Thus, under the Board's reasoning, there is no necessity for a showing that a strike or partial strike has taken place against the neutral and no need to show that it was an object of union activities directed against a neutral to *force* that neutral to stop doing business with someone else; it is sufficient to constitute a violation of Section 8(b)(4)(A) if third parties other than the neutral have been required, against their will, to cease dealing with someone else as a result of their refusal to handle.

Such an argument, it is submitted, flies in the face of the plain terms of Section 8(b)(4)(A) and cannot be justified even under the Board's basic premise that it was the purpose of Congress to protect the public generally, and most certainly not if that premise cannot be accepted.

Perhaps the shortest answer to this argument of the Board is found in the opinion of this Court in the case in which it first had occasion to examine Section 8(b)(4)(A) and determine its scope and purpose. That case is *NLRB v. Denver Building and Construction Trades Council*, 341 U.S. 675. At page 687 thereof, this Court stated that Section 8(b)(4)(A) "restricts a labor organization and its agents *in the use of economic pressure* where an object of it is to *force* an employer or other person *to boycott someone else*" (emphasis supplied). The phrase "economic pressure" would appear to denote a strike, or at least something more than activity to which the neutral employer had consented. The phrase "to force" the neutral employer

would seem to mean just what it says and not what the Board says. Finally, the phrase "an employer or other person to boycott someone else" implies something more affirmative than merely an inability to be able to deal with some other person as a result of, or as an indirect effect of, someone else's boycotting activities.

Let us pursue the above analysis in a little more detail and examine a little more closely the Board's attempt to stretch the plain language of Section 8(b)(4)(A). Such an examination will serve the purpose both of exposing the error in the Board's arguments and of demonstrating affirmatively that the Drivers Union's activities in this case did not constitute a violation of Section 8(b)(4)(A)—that such activities did not involve a *strike* or inducement to *strike;* that any inducement not to handle did not occur *"in the course of their (the carrier's employees'), employment";* that there was no *forcing* the carriers to cease handling American Iron and Freight; and, finally, that it was not an *object* of the Union's inducements to force the carriers to cease handling American Iron and Freight, but rather its object was to obtain compliance with its agreement. Thus, it will be seen that there is absent in this case not only one but all of the elements of an 8(b)(4)(A) violation.

3. *The Element of Strike or Similar Coercion Against the Neutral Is Not Present in This Case.*

The Board argues (Brief, page 42) that the term "strike or concerted refusal" as used in Section 8(b)(4) can include action which is not contrary to an employer's will and can occur whenever a union requests its members not to perform a work task. The "significant fact," says the Board, is "that" the union has encouraged it." This argument goes even a step further than the position taken earlier by the Board in "struck goods" litigation that "literally the 'concerted refusal' phase proscribes inducing employees to refuse, while at work, to perform a task which

they would have done absent the inducement" (the Board's brief before the Ninth Circuit in the *Sand Door* case, page 24).[10]

This argument of the Board again ignores the plain language of the Act and its legislative history. The key word in the portion of Section 8(b)(4)(A) here under discussion is the word "strike." The meaning of that word is clear enough; there must be the coercion of a strike, not any refusal or refusal absent coercion. What the Board refuses to recognize is that the succeeding phrase, "concerted refusal," when taken in context with the entire expression "concerted refusal in the course of their employment to . . . handle any goods . . . or to perform any services," does not include any type or act of refusal but only an act of refusal which is tantamount to strike action or to partial strike action. It was necessary to include a partial strike among the proscribed means in order to reach the so-called "product boycott" which, as seen by the discussion of the legislative history of the Act, *supra*, it was the principal purpose of Congress to prevent. In the case of a "product boycott" of struck goods, for instance, the employees involved would refuse to work only at such times as struck goods or unfair goods came to them for loading, unloading, or otherwise handling, and during the remainder of their working day they would continue to work, or they might turn to other work and work throughout their working day. Thus, what they did may not have been embraced under the ordinary concept of what constitute a strike, and may have constituted only a corrected refusal to work at a particular period during their day's employment.

[10] Although this latter point is not pressed in its present brief, nevertheless, it can be asked how the Board can possibly assume that the employees in the present case would have done the work in question "absent the inducement," after it had been brought to their attention that certain freight was from a struck firm when it had already been agreed by their employer not only that they would not be required to perform this work but also that they would not be "allowed" to.

The language of Section 8(b)(4)(A) was carefully drafted to reach these partial strikes, as well as total strikes. The phrase "concerted refusal" of "the employees of any employer" to perform "work" or render "services," far from being an original formulation, is the dictionary definition of "strike." See Webster's New International Dictionary, p. 2496; Black's Law Dictionary, 1951, p. 1591; American College Dictionary (Random House, 1952), p. 1198, definition 60. But a strike, whether full or partial, necessarily involves an element of coercion or action contrary to an employer's will. A strike contemplates an act of insubordination under which union members, acting in concert, refuse to perform their customary services. A strike is the concerted withholding of labor for the purpose of obtaining the employer's accession to a demand which he is resisting. It is the employees' cessation of "work at their own volition because of the failure of the employer to meet their demands."[11]

Thus, in context, the term "refusal" refers to "a concerted insubordination" in the nature of a strike which the Board and the Second Circuit in the *Conway* case referred to and which the Board and the courts have followed since Taft-Hartley was enacted.

The Board itself, in its brief before the Second Circuit in the *Conway Express* case, expressed what we are trying to say here respecting the type of economic pressure which is embraced under the term "strike or concerted refusal to work" as well as we have ever seen or heard it expressed:

> "In these circumstances, the refusal of the employees to handle Rabouin's freight was not a strike or a concerted refusal to work induced by the Union in violation of Section 8(b)(4)(A). A strike is the concerted withholding of labor to gain the employer's accession to a demand which he is resisting. It is the employees' cessation of 'work at their own violation because of the

[11] *N.L.R.B. v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 256.

failure of the employer to meet their demands.' In this case, however, the employees' refusal to handle Rabouin's goods was not in opposition to their employer. It was in keeping with the advance agreement of each employer, not repudiated but acquiesced in throughout. Thus, the indispensable prerequisite of a strike—a demand which the employer resists and for which the strike is called—is missing. *A refusal to work in which the employer concurs can hardly be called a strike against him.*" (Emphasis added.)[12]

Since under a "struck goods" clause the employer has agreed in advance that the employees will not handle "struck goods," there can be no coercion, no insubordination, no refusal to perform customary services because

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[12] From the time Taft-Hartley was enacted until its decisions in *McAllister, Sand Door* and the instant case, the Board, with judicial approval, adhered to this construction of the term "concerted refusal" as used in Section 8(b)(4). In its Brief to the Supreme Court of the United States in *NLRB v. International Rice Milling Co.*, 341 U. S. 665 (p. 29), the Board stated that what a labor organization is forbidden by Section 8(b) (4) to do is "to direct its pressures against a neutral employer by depriving him of the services of his own employees." In its brief in *NLRB v. Denver Bldg. and Construction Trades Council*, 341 U. S. 675 (p. 22), the Board said that what Section 8(b) (4) (A) forbids is "strike action directed against an employer who is not in a position to grant the Union's economic or organizational demands, i.e., a neutral or 'secondary' employer." The Supreme Court agreed. Explaining why in the *Rice Milling* case the Union's inducement of employees of a neutral not to cross the picket line did not fall within the prohibition, the Supreme Court said: "The Union did not engage in a strike against the customer. It did not encourage concerted action by the customer's employees to force the customer to boycott the mill." *NLRB v. Denver Building & Construction Trades Council*, 341 U. S. 675, 687-688. See also the Board's decision in *Sealright Pacific, Ltd.*, 82 NLRB 271, 291, and *Schultz Refrigerated Service*, 87 NLRB, 502, 508.

This "contemporaneous construction of [the] statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new," if not conclusive, is at least entitled to great weight. *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 315.

there can be no refusal of something which is not even demanded or which could not legitimately be demanded; it cannot be said that the handling of such "struck goods" is part of the employees' customary or expected services, or are services which the employer can require his employees to perform under their contract of employment, or are services which he could have expected his employees to perform "absent the inducement." Indeed, as pointed out by Board Members Murdock and Peterson in *Sand Door*, 113 NLRB 1210, far from constituting a strike or other act of insubordination, the action of a union either in calling a "struck goods" clause to the attention of its members or otherwise inducing them to seek the benefits of the clause by refraining from handling "struck goods" would seem to constitute the discharge of a duty of the union to keep the employees it represents informed at all times of their rights under the contract, including pointing out the fact that the handling of "struck goods" is not within the scope of their employment.

The legislative history of the Act also confirms the conclusion that Congress sought to interdict a *strike*, or something in the nature of a *strike*, directed against an innocent neutral. As indicated earlier in this brief, Senator Taft and other Congressional leaders repeatedly expressed their disapproval of *strikes* against neutrals, and all of the examples of secondary activity include some form of *strike* action or of a refusal to work taking place contrary to a neutral employer's wishes.

Finally, as discussed earlier (*supra*; p. 29) this Court in the *Denver Building Trades* case made express reference to the element of "forcing" an employer to boycott someone else, so that coercion must be considered an element.

The Court of Appeals for the Second Circuit in the *Crowley Milk* case, *supra* 245 F.2d at 820, 822, made the following cogent answer to the contention of the Board that there need be no element of employer coercion:

"The statutory language is clear: there is no violation of §8(b)(4) unless the union encourages the employees to *coerce* the secondary employer. Where the employees are encouraged only to exercise a valid contractual right to which the employer has agreed there is no coercion. Normally the secondary employer receives something at the bargaining table in exchange for granting the hot cargo clause, and he is no more coerced when the employees subsequently exercise their privilege than a landowner is coerced when those to whom he has granted licenses cross his land.

* * * *

"In this most recent statement [the majority of the Board in *Sand Door* to the effect that there is still an 8(b)(4) violation even though the employer acquiesces in the refusal to handle] the reaction of the secondary employer has become wholly irrelevant, and there is still no explanation as to how the majority supplies the missing element of 'coercion.' Although only this latest position is urged upon us by the Board, we have considered both it and Chairman Farmer's original version and rejected them both. The latest Board view fails to distinguish between instances of employer coercion and instances of employer consent."

In its earlier decision in *Conway Express (Rabouin v. N.L.R.B.*, 193 F.2d at 908) that same Court stated as follows concerning the necessity of showing some strike-induced coercion as a prerequisite to the application of Section 8(b)(4)(A):

"Petitioner also sees in the union's pressure on neutral employers to stop accepting his shipments a violation of the secondary boycott provisions. § 8(b)(4)(A). Even if the demands carried with them an implicit threat to strike, we cannot agree that they tended to induce or encourage the employees to engage in a strike or concerted refusal forcing the employer to cease doing business with another. The embargo on Rabouin's goods was the product solely of requests addressed to management or supervisory personnel. The former are clearly employers, and the latter have

lately been so defined by the new § 2 (2, 11), 29 U.S.C.A. § 152 (2, 11). The union thus did not 'encourage the employees'.

"Nor did it bring about the strike or concerted activity prohibited by § 8(b)(4)(A). See *N.L.R.B.* v. *International Rice Milling Co.*, 341 U.S. 665. Petitioner urges us to read into this formula an additional proscription of threat of sanctions against third parties, arguing for this as an interpretative device to make the section workable. Perhaps such an interpretation would have been justifiable or desirable were this a new statute of less general significance. But in a matter of such bitter controversy as the Taft-Hartley Act, the product of careful legislative drafting and compromise beyond which its protagonists either way could not force the main body of legislators, the courts should proceed cautiously. For it would appear that Congress has already spoken in this regard. The House version of the bill, H.R. 3020, 80th Cong., 1st Sess., incorporated the rule against threat to strike the petitioner would have us adopt, in §§ 2(14), 12(a)(3); but the present phraseology is the product of a joint conference wherein the Senate's draft to the contrary was adopted. 1 N.L.R.B., Leg. Hist. of the Labor-Management Relations Act 42, 112-113, 168-169, 204-205, 240, 546, 547. See *Schatte* v. *International Alliance, etc.*, 9 Cir., 182 F. 2d 158, 165, certiorari denied 340 U.S. 827, construing similarly the parallel wording of § 303, 29 U.S.C.A. § 187. We should not interpolate into the Act restrictions against union activity which Congress has purposely deleted, *N.L.R.B.* v. *National Maritime Union of America*, 2 Cir. 175 F. 2d 686, 690; certiorari denied *National Maritime Union of America* v. *N.L.R.B.*, 338 U.S. 954.

"The union cannot have committed an unfair labor practice under this section in regard to those employers who refused to handle Rabouin's shipments under the terms of the area agreement provision relating to cargo shipped by struck employers. Consent in advance to honor a hot cargo clause is not the product of the union's 'forcing or requiring any employer . . . to cease doing business with any other person.' § 8(b)(4)(A)."

The Court below similarly found it impossible to conclude that in the circumstances of the present case there was any strike or other refusal to work or any forcing of any employer to boycott someone else:

> "Here the Teamster's conduct only consisted of urging the employees of the carriers not to handle freight from a company which they considered unfair. This was exactly what the carrier had agreed their employees would not be required to do. If an employer may lawfully agree that its employees will not be required to handle freight from a struck company, and such a situation arises, it is hard to see how it can be said that, simply because the employees do what they have the right to do, there was a strike or refusal to work. Nor can it be said that there was a "forcing" or requiring of an employer to cease doing business with another person, because the employer was only being compelled to live up to its own voluntary contract entered into in advance of the happening."

It would appear clear from the foregoing that at least one important element of Section 8(b)(4)(A)—encouragement of employees to engage in a *strike* or concerted refusal to handle goods in the nature of a *strike*—cannot be said to be present when the union party to a "struck goods" clause invokes it by appeal to its members, and this even though the employer repudiates the clause and asks his employees to disregard their rights under their agreement by handling the "struck work" despite his commitments. Even if the employer repudiates, still, unless the Board is to condone such repudiation, consent had in fact been given in advance, which consent must be taken as having some legal effect for the term of the contract.

4. *The Element of a Refusal "in the Course of Employment" Is Not Present Because the "Struck Goods" Clause Took the Loading of American Iron Freight out of the Area of Employment.*

A second necessary element in the application of Section 8(b)(4)(A) is here absent, for it cannot be said the "refusal" of the dock employees to unload American Iron

freight was made "in the course of their employment" as required by that section. This is so because the "struck goods" clause involved in this case not only removes from the area or scope of the required duties or functions of the carriers' employees all work involving the handling of "struck goods," but goes even further in saying that the carriers *shall not "allow"* their employees to handle any "struck goods."

In addition to requiring disobedience of orders in the nature of a strike under Section 8(b)(4)(A), Congress took pains to assure that disobedience would be unlawful only if the orders involved were ones which the employer could properly issue within the confines of the particular employment relationships. To accomplish this result, Congress added the phrase "in the course of their employment." That phrase would have been wholly superfluous if Congress had desired to extend the reach of the section to any activity in which the employees engaged *qua* employees. For the preceding limitations of the prohibition to inducement of "employees" amply sufficed to preclude its extension to acts performed by employees in other capacities, *e.g.*, as private consumers or as "agents" of their employer.

Congress did not, of course, define the "course of employment" for all or any particular employees. It left that function where it has always been, in the employer and his employees or their bargaining agent. *Cf.* Section 8 (d). Ever since there has been such a thing as collective bargaining, it has been the practice to specify in the collective agreement, often in great detail, exactly what work tasks or duties will or will not be required of employees; indeed, when pursuant to collective action, employees agree to accept employment, a prime consideration is the scope of the employer-employee relationship. Suppose, for instance, that, as often happens, it is specified that production employees shall not be required to do the work of supervisors or, conversely, that supervisors will

not be employed to do production work or to work with the tools of the trade. Would a refusal on the part of the individuals involved to do the proscribed work on request of their employer constitute a refusal in the course of employment, or if the refusal was union-induced, would there be an 8(b)(4)(A) violation? Obviously not. Similarly, as noted in the brief for petitioners in Case 127, p. 26, it is common practice to agree that employees will not be required to work under certain unfavorable or unsafe conditions or that employees will not be required to use certain types of tools, yet it has never been urged that such agreements amount to a secondary boycott. Or suppose restrictions on doing certain types of heavy work or other unsuitable work are inserted in collective agreements, as is often the case in respect to female employees. Does the refusal to do that work upon request constitute the refusal contemplated under Section 8(b)(4)(A)? Again, obviously not. These examples cannot be differentiated from the hot cargo agreement involved in this case. Indeed, the argument here is even stronger because the agreement states not only that the employees shall not be required, but they shall not be *allowed* to do certain work.

In the case of the "struck goods" clause as well as in the case of all the other examples cited above, it has simply been provided that the work in question shall not be part of the job of the employees. It follows that the refusal to perform that job cannot be considered a refusal "in the course of employment," and there can be no 8(b)(4)(A) violation. Prior to *Sand Door* and the instant case, the Board expressly so held. *Pittsburgh Plate Glass Co.*, 105 NLRB 740, 744; see also, *Rabouin v. NLRB*, 195 F.2d 906, 912 (C.A.2). To the extent that some of the present Board members have attempted to say that employees through their union cannot attempt to arrange their own conditions of employment and specify the contents of their jobs, it would appear that they have arrogated to themselves authority to supersede arrangements as to work assign-

ments made by private parties through the statutory procedure of collective bargaining with arrangements which these members regard as preferable. This Court, in *American National Insurance Co. v. NLRB*, 343 U.S. 395, has held that the Board has no such authority. *Cf. N.L.R.B. v. Rockaway News Supply Co.*, 345 U.S. 71, at 79.

The Board argues (Brief, p. 45) that the phrase "in the course of their employment" was intended to distinguish between employees in their capacity as employees and employees in their capacity as consumers. The answer to this contention is well set forth by Board Members Murdock and Peterson in the *McAllister* case, *supra*:

> An examination of the legislative history of Section 8(b)(4)(A) does not disclose that Congress intended to attach any special meaning to the words "in the course of employment." Therefore, while we do not say that the interpretation which Members Rodgers and Beeson would give to the phrase is lacking in merit, we cannot agree that their construction is any more an expression of Congressional intent than was the Board's interpretation in the *Pittsburgh* case. As Members Rodgers and Beeson suggest, the phrase may be "simple" and there may be "nothing esoteric about the language," but the fact of the matter is that it is susceptible to different interpretations. We believe the Board's interpretation as set forth in the *Pittsburgh* case is the more plausible and correct one. We note that such courts as have had occasion to pass upon the language have accepted that interpretation.

5. The Element of "Forcing Or Requiring" the Carriers to Cease Dealing with American Iron Cannot Be Present When Those Carriers Had Already Committed Themselves Not to Do Business with That Company.

A final element necessary to the application of Section 8(b)(4)(A) which cannot be said to be here present is that it was an object of the Drivers Union's inducement herein "to force or require" the neutral carriers to cease doing business with American Iron. We have already seen

that this Court in the *Denver Building Trades* case (341 U.S. at 687) has stated that that section is applicable where it is an object of the union "to *force* an employer or other person to boycott someone else," and see the quotations from the decisions of the Second Circuit in *Conway Express* and *Crowley Milk* cases, and from the Court below in *American Iron*, *supra*, p. 35. It cannot be said in the instant case that there is any "forcing" of the neutral carriers to boycott American Iron when those carriers had already committed themselves not to do business with that company if it became involved in a labor dispute, indeed, had pledged themselves that they would not allow their employees to handle American Iron goods for shipment in that event.

The Board, while agreeing that under a "struck goods" clause there can be no "forcing" of a neutral employer whose employees have been asked not to handle the goods pursuant to their contract, argues that there is a forcing of other persons such as customers who might want to do business with American Iron but are prevented from doing that business because of the boycott. This argument, however, is again predicated on the assumption that 8(b)(4)(A) was intended to give protection to the public in general against the effect of boycotts and that the phrase "other person" means all other third parties. We have already demonstrated the fallacy of this assumption.

The Board also argues that the word "requiring" in Section 8(b)(4)(A) is applicable even though the word "forcing" is not, because even if the carrier acquiesces, his employees' refusal to handle the product necessarily curtails the carriers' continued right to handle the "struck" goods of American Iron. But this forgets that the employer by formal contract *has already foregone the right* to use that product or to handle such goods.

Thus, there is only one premise on which the Board's argument in this connection can make any sense at all, and

that is on the premise that it is the Board's function to condone, indeed encourage, an employer to breach or disregard or ignore his own solemn commitments. We have seen that such a concept offends the moral sense, is contrary to all concepts of contract law, and contravenes the general policies of the Act. It is difficult to believe that this Court would countenance for a moment any such administrative policy of condoning contract repudiation. Rather, we think this Court will agree with the following observations of Board Members Murdock and Peterson dissenting in the *McAllister* case, *supra:*

> "Moreover, we are not at all convinced that where an employer has, in fact, repudiated a 'hot cargo' contract the Board should countenance such conduct. If a 'hot cargo' contract is valid—and the Board and Courts, as we have indicated, have said that it is—we question whether the Board should approve a breach by one party which subjects the other party to a finding that the latter has violated the Act. We do not consider it a proper function of this Board to disregard the sanctity of valid contracts nor are we aware of any other situation where the Board has espoused such a view. Certainly, if a union and an employer entered into a contract containing a valid union security clause, and the employer, in effect, repudiated the agreement by refusing the union's request to discharge an employee for nonpayment of dues, the Board would not find that the union had violated Section 8(b)(2) of the Act. Similarly, it would seem that where an employer has actually repudiated a 'hot cargo' contract, the Board should find that the union has not violated Section 8(b)(4)(A). For these reasons, we cannot agree with the Chairman's view that emphasis should be placed upon the 'entire course of conduct' rather than the provisions of the contract itself."

6. *The Object of The Union's Appeal to Its Members Was to Obtain Compliance with The Agreement; There Was No Evidence of An Illegal Object to Force the Carrier to Cease Doing Business with American Iron.*

Finally, any forcing or requiring must have a direct, not

an incidental object of requiring the neutral employer not to handle the goods of another. However, here the direct and, indeed, the only object of the union's action in asking its members to observe the "struck goods" clause was to obtain the benefits of that clause for those members (i.e., to preclude their being used in any strike-breaking capacity), as already agreed to by the employer. It is only as an incident of employer compliance—a compliance required by the law of contract—that the employer would stop doing business with American Iron.

Since, as we have seen, the union had a right to define the terms of employment of its members, and since it had in fact obtained the pledge of the carriers that they would not allow union members to handle struck goods, when the carriers refused to abide by their agreement and the union asked its members nevertheless to refrain from unloading the American Iron freight, the union's immediate and direct object was to obtain compliance with the agreement, that is, see to it that its members did not have to act, if not as strike-breakers, at least as allies of a struck employer as they had been promised when they took employment. When the situation contemplated by the agreement materialized and the carriers refused to comply with their agreement, the union took the most readily available means of enforcing the agreement; it could hardly be expected to await court litigation. The fact that the American Iron Company happened to be the employer engaged in a strike so that its freight and not that of some other employer was involved was purely happenstance. Any one of a hundred other employers doing business with the carriers might just as well have been involved, and there was nothing in the relationship between the American Iron Company and the Drivers Union which would give that union any reason for desiring to boycott it rather than some other employer. And for that matter, the carriers could have handled American Iron freight with supervisors

or even have utilized American Iron employees. All that the Drivers Union was concerned with was to see to it that the work required of its members was limited to the area described in the collective agreement. Surely the union's actions were more consistent with the desire to relieve its members of the necessity of acting in a strike-breaking capacity and in obtaining fulfillment of the carriers' pledges to this effect than with a desire of forcing the carriers to boycott American Iron.

Section 8(b)(4)(A) does not make concerted activities illegal merely because one of their concomitants or consequences is to terminate business relations between parties to a labor dispute and their customers, or even between two neutral parties. If it did, all picketing would be outlawed. See *N.L.R.B. v. International Rice Milling Co.*, 341 U.S. 665; *Sales Drivers, Helpers & Building Construction Drivers, etc. v. N.L.R.B.*, 97 U.S. App. D.C. 173, 229 F.2d 514; *N.L.R.B. v. Teamsters Local 968* (C.A. 5), 225 F.2d 205; *Oil Workers International Union v. Pure Oil Co.*, 84 NLRB 315. And see the brief of petitioners in Case 127, pages 14, 17, and 29 particularly, where the failure of the Board to distinguish between the "effect" of concerted activity and concerted activity undertaken for the particular "object" proscribed in the Act is commented upon. An illegal object cannot be inferred merely because it is one of the consequences of a course of action taken pursuant to a principal and valid object. This important distinction has recently been amplified by Judge Learned Hand, speaking for the Second Circuit, in *Douds v. International Longshoremen's Association*, 224 F. 2d 455, 459 (cert. denied 350 U.S. 873), where he stated:

> "It is indeed true that this [cessation of business between trucking concerns and their customers, who were neutrals in the labor dispute] was one of the probable, nay perhaps, inevitable, consequences of the refusal [of the Union's members to serve the trucks]; but the liability imposed by the section is much more limited than the usual liability for a tort, which extends

to any damage that the tortfeasor should reasonably have expected to result from his act. All strikes and 'concerted refusals' to work involve some cessation of business; that is the only sanction they can have. When Congress limited the wrong to occasions when the cessation was an 'object' of the conduct, it excluded much indeed that the ordinary law of tort would have included. If it had not done so, it would have made nearly all strikes unlawful. The 'object' of an action is the concluding state of things that the actor seeks to bring about; that which satisfies his aim. Hence it is a term relative to the whole sequence of steps that he proposes; and it does not apply to those that are only intermediate to it. If I wish to enter my house, but can do so only by passing through my garden, my 'object' is to enter the house, and it is not a subsidiary 'object' to pass through the garden. On the other hand, if I find the garden gate locked, and I take out my key, the 'object' of my doing so is open the gate, though it is still only a step towards entering the house. So in the case at bar, if the respondents' refusal to serve the trucks was merely to cause a cessation of business between the 'Association' and the trucking companies or between those companies and their customers, that may have been within the section, though not even that is perfectly certain as will appear. On the other hand, if the refusal was a part of the struggle for control of the Port, that was the only 'object' in the sense that the term is used in the section, unless it is to cover all acts in a labor dispute that are known and intended to result in a cessation of business between others."

In *N.L.R.B. v. Houston Chronicle Publishing Co.*, 211 F.2d 848 (C.A. 5, 1954), a labor relations case where the respondent was an employer rather than a union, that Court held:

"When the Board could as reasonably infer a proper motive as an unlawful one, substantial evidence has not proved the respondent to be guilty of an unfair labor practice."

In the instant case there is no actual evidence, not to speak of substantial evidence on the whole record, that

the union or any of its agents had an unlawful object. "The burden 'was upon the Board to prove its charges by competent and credible evidence and not upon the Respondent to disprove them.' *National Labor Relations Board v. Ray Smith Transport Co.*, (C.A. 5), 193 F. 2d 142, 144." (Quoted in *N.L.R.B. v. Reynolds & Manley Lumber Co.*, 212 F.2d 155, 158 (C.A. 5, 1954). See also Administrative Procedure Act, 5 U.S.C.A. §1001 *et seq.*, and *Sales Drivers, Helpers & Building Construction Drivers Local Union 859, etc. v. N.L.R.B.*, 97 U.S. App. D. C. 173, 229 F.2d 514, and *Universal Camera Co. v. N.L.R.B.*, 340 U. S. 474.

III

The Status of the "Struck Goods" Clause under the Interstate Commerce Act Cannot Affect Its Validity under the National Labor Relations Act.

The Board's final argument (Brief, p. 55) advances a new concept of illegality, namely, that "struck goods" clauses, at least when involving an interstate common carrier, must be considered legally ineffective under Taft-Hartley because they conflict with the provisions of the Interstate Commerce Act. This is a concept of illegality which, prior to the Board's recent decision in the *Genuine Parts* case, had never even been referred to by any of the many Board members who have had occasion to consider the "struck goods" issue. Inasmuch as this concept was not litigated below and forms no part of the decision which the Board here seeks to overturn, we will not undertake any extended analysis and refutation of such argument or of the views of Board Members Leedam and Jenkins in the *Genuine Parts* case (Board's Brief, p. 89, *et seq.*), but instead refer this Court to the arguments in rebuttal appearing in the minority opinion of Board Member Murdock in that case (Board Brief, p. 126, *et seq.*). We cannot refrain, however, from noting some of the difficulties that are implicit in the Board's most recent argument.

(1) Insofar as the employees involved in the present case

are concerned, it is questionable whether they or their activities are subject to I.C.C. regulation. Ordinarily, dock employees engaged in moving, loading, and unloading freight on the dock are not. (See Commerce Clearing House, Federal Carrier Reporter, Para. 18002-18025 where the applicable cases are cited.)

(2) It is not any proper function of the Board to attempt adjudications in the area of I.C.C. jurisdiction. Because the Interstate Commerce Commission may find that a "struck goods" clause does not operate to excuse a carrier from the duty prescribed in the Interstate Commerce Act to accept or deliver freight, it would not necessarily follow that either the clause itself or union activities to enforce it constitutes a violation of the National Labor Relations Act, as amended. The one Act (I.C.A.) establishes certain duties which, depending on the circumstances of each particular case, the carrier may or may not have breached, or in respect to which certain union activity may or may not constitute a defense to a claim of breach. Taft-Hartley on the other hand establishes certain employee rights in the field of labor relations and prohibits certain specific union and employer activities in that field; which is a field quite different from and much broader in scope than the field of common carrier responsibility. As stated by Board Member Murdock in *Genuine Parts* (Board Brief, p. 132):

> "Comity between governmental agencies does not require that the ICC find a common carrier in violation of the ICA because the Union representing its employees has engaged in a secondary boycott affecting the operations of the common carrier. Comity does not require that the Board find a union's conduct, otherwise lawful, unlawful under Section 8(b)(4)(A) because a common carrier has, at the union's request, violated the provisions of the ICA."

As further pointed out by Board Member Murdock in that case, it is the function of the Commission to decide whether a carrier in refusing freight, has acted "reason-

ably" regardless of the legality or illegality of his contractual commitments and regardless of the legality or illegality of union activities in the light of which the carrier has taken certain action. Thus, the Commission can conceivably find that a carrier has failed to fulfill his duties and has acted unlawfully because he has refused to transport freight as the result of a lawful strike of his own employees—the Commission might determine that the carrier should have obtained replacements or taken some other course of action to see to it that its customers were accommodated. Would the Board on that basis then hold that such a strike, specifically protected under Section 13 of Taft-Hartley, is nevertheless unlawful under that Act? We think not.

(3) Although the Interstate Commerce Commission has recently had opportunity to pass on the issue of the legality of "struck goods" under the Interstate Commerce Act, it expressly declined to make any such determination on the ground that it lacked jurisdiction, such determination being exclusively for the National Labor Relations Board under the Taft-Hartley Act. *Galveston Truckline Corp. v. Ada Motor Lines, Inc.*, MC-C-1922, decided December 18, 1957. It there stated:

> "In its exceptions, Associated Industries of Oklahoma, while agreeing generally with the conclusions of the examiner, urges that we should go a step farther and declare these hot cargo clauses illegal as being in direct conflict with the obligations of common carriers to serve the public indiscriminately. We cannot accept this view. The agreements between carriers and labor organizations affecting labor relations between employers and employees are matters which Congress has seen fit to entrust to the supervision of the N.L.R.B., and we lack the jurisdiction to consider the legality or propriety of such agreements."

This being so, it surely would not constitute any function of or be within the province of the National Labor Relations Board to attempt to make adjudications on behalf

of the Interstate Commerce Commission; the fact that the Interstate Commerce Commission also held by way of dictum that the "struck goods" clause may not, depending on the particular circumstances in a particular case, constitute a defense to a carrier's refusal to transport certainly affords no basis for a flat holding that such agreements are illegal or unenforcible under Taft-Hartley.

(4) There is nothing in the language of the National Labor Relations Act, as amended, and nothing in its legislative history which makes any distinction between common carriers and other types of employers which come under the Act's provisions. On the contrary, Section 10(a) of the Act expressly prevents ceding of jurisdiction over the "transportation" industry except when local in character. From this, it is clear that Congress intended to make common carriers equally with all other employers subject to all protections as well as all prohibitions of the Act. Indeed, since most transportation—all by railway and air—is covered by the Railway Labor Act, Congress must have had the common and contract carriers by motor vehicle specifically in mind when it manifested this intent.

(5) Under the Taft-Hartley Act, Congress undertook to legislate broadly and definitively in the entire field of labor relations and establish therein certain rights, duties, and prohibitions. *Amazon Cotton Mill Co. v. Textile Workers Union*, 167 F.2d 183 at 186, and, as stated by this Court in *Garner v. Teamsters Union*, 346 U.S. 485 at 490:

> "Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."

Since, as we have seen, Congress did not see fit to outlaw the "struck goods" agreement and since Congress presum-

ably desired to permit the continuance of this traditional device along with other traditional types of labor activity not expressly proscribed, such clauses must be deemed to stand protected under the Act as a means of accomplishing, along with protection of the rights of striking and picketing, the Act's ultimate objectives, and this even though disruptions to commerce might result, as in the case of strikes or picketing, from the exercise of that right.

Indeed, Congress went even further to evidence its intention that rights and obligations created under the National Labor Relations Act shall stand as paramount. Section 10(a) of the Act specifically directs that the jurisdiction and power of adjudication of the National Labor Relations Board "shall not be affected by any other * * law * * *." Accordingly, since Congress legislated broadly and exclusively in the field of labor relations under Taft-Hartley at a date subsequent to the date it legislated in respect to the operations of the Interstate Commerce Commission, it would appear reasonable to infer that union activities and practices which are legal under Taft-Hartley continue to remain legal regardless of how the Interstate Commerce Commission may regard such practices or activities under the provisions of the Interstate Commerce Act.[13] Indeed, to the extent that union practices and activities are legally protected under Taft-Hartley (*Cf. Garner v. Teamsters Union, supra*), it can well be said that their exercise may give reasonable excuse for failure to perform what might otherwise be a common carrier duties under the Inter-

[13] Even were one to assume that prior to 1947 the I.C.C. had jurisdiction over the actions of labor organizations in contracting with respect to matters affecting interline practices, it would appear perfectly plain that the subsequent enactment of the Labor Management Relations Act of 1947, deprived the Commission of whatever possible jurisdiction it might previously have had, and placed jurisdiction over them in the NLRB. Such an occurrence is not unusual. Congress in other situations has sometimes carved out areas from an administrative agency's scope and placed them within the superseding jurisdiction of another agency. *Eugene*

state Commerce Act. This is particularly true since both Acts have as an objective the elimination of obstructions to commerce. Congress, not having considered the making or enforcement of "struck goods" agreements a sufficient obstruction to interstate commerce as to require their proscription under Taft-Hartley, and not having made any exception in respect to the operation of the Interstate Commerce Act, it would follow that such agreements stand protected regardless of the provisions of the Interstate Commerce Act. In other words, it must have appeared more important to Congress that certain practices be permitted in the area of labor relations than that an occasional but limited interference with the duty of the common carriers to accept and deliver merchandise should take place. Obviously strike action would occasion more than limited interference with such duty, but Congress nevertheless gave it paramount protection in Taft-Hartley.

(6) This Court in its decisions in *Weber v. Anheuser-Busch, Inc.* 348 U.S. 468, and in *General Drivers v. American Tobacco Co.*, 348 U.S. 978, has already given plain indication that it considers activities and practices permitted under Taft-Hartley to supersede state restraint-of-trade statutes (the *Weber* case) and state policy respecting the common law duties of common carriers to accept freight (the *American Tobacco* case). Indeed, the *American Tobacco* case involved a situation almost identical to that involved in the present case including the presence of a

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Dietzgen Co. v. FTC, 142 F.2d 321, 331 (CA 7, 1944); cert. den. 323 U.S. 730 (1944); *United Corp. v. FTC*, 116 F.2d 473, 475 (CA 4, 1940); *Chamber of Commerce of Minneapolis v. FTC*, 13 F.2d 673, 685-686 (CA 8, 1926); *U.S. v. Western Union Telegraph Co.*, 53 F. Supp. 377, 381 (S.D. N.Y., 1943); *T. C. Hurst & Son v. FTC*, 268 Fed. 874, 877 (E.D. Va., 1920); *Far East Conference v. U.S.*, 342 U.S. 570, 573-574 (1952); *U.S. v. Rock Royal Cooperative*, 307 U.S. 533, 558-560 (1939); *U.S. Navigation Co. v. Cunard S. S. Co.*, 284 U.S. 474, 485 (1932); cf. *U.S. v. American Trucking Assns.*, 310 U.S. 534, 544-545 (1940); *Brougham v. Blanton Mfg. Co.*, 249 U.S. 495, 499 (1919).

"struck goods" clause. Nevertheless, this Court had no hesitancy in finding the jurisdiction of the National Labor Relations Board under Taft-Hartley to determine rights and duties of employers and employees thereunder to be paramount. The need for "centralized administration" (*Garner v. Teamsters Union, supra*) or "a single paramount administrative or judicial authority" (*Amazon Cotton Mill v. Textile Workers Union, supra*, p. 186) remains the same regardless of whether possible supersession appears from a state or Federal source.

CONCLUSION

It is difficult to escape the conclusion that a majority of the present Board members, in an effort to reach what they apparently considered an evil—the "struck goods" clause—have substituted, out of personal predilection, their concept of what the scope of the secondary boycott prohibitions of Section 8(b)(4)(A) should be for that of the Congress. It would appear plain that acceptance of their theory of the scope and application of Section 8(b)(4)(A) would constitute administrative legislation of the most flagrant nature. But the Board may not "pause to consider whether a statute differently conceived and framed would yield results more consonant with fairness and reason," as the present Board conceives those terms. *Anderson v. Wilson*, 289 U.S. 20, 27. In point is *Colgate-Palmolive-Peet* v. N.L.R.B., 338 U.S. 355, 363:

> "It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. That policy cannot be defeated by the Board's policy, which would make an unfair labor practice out of that which is authorized by the Act . . . To sustain the Board's contention would be to permit the Board under the guise of administration to put limitations in the statute not placed there by Congress."

Especially, may neither administrative tribunals nor the courts seek to substitute their judgment for that of Congress when there is involved, as here, an enactment as

controversial as Taft-Hartley. As stated, by the Second Circuit in *Rabouin v. N.L.R.B.*, 195 F.2d at 912:

> " . . . in a matter of such bitter controversy as the Taft-Hartley Act, the product of careful legislative drafting and compromise beyond which its protagonists either way could not force the main body of legislators, the courts should proceed cautiously."

It is respectfully submitted that the decision of the Court below should be affirmed.

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APPENDIX A

MILK DRIVERS UNION v. NLRB
(Crowley's Milk Co.)
U.S. Court of Appeals,
Second Circuit (New York)

MILK DRIVERS AND DAIRY EMPLOYEES LOCAL UNION No. 338, AFL-CIO v. NATIONAL LABOR RELATIONS BOARD; MILK DRIVERS AND DAIRY EMPLOYEES LOCAL No. 680, AFL-CIO v. Same, Nos. 346 and 347, June 19, 1957.

Before CLARK, Chief Judge, and SWAN and POPE, Circuit Judges.

Full Text of Opinion

CLARK, Chief Judge:—Milk Drivers and Dairy Employees Local 338 and Milk Drivers and Dairy Employees Local 680 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO, petition this court to review and set aside two orders of the National Labor Relations Board based on findings by the Board that each petitioner was guilty of violating §§ 8(b)(4)(A) and 8(b)(4)(B) of the Labor Management Relations Act of 1947, 29 U.S.C. §§ 158(b)(4)(A) and 158(b)(4)(B). 116 NLRB 1408, 39 LRRM 1004. The Board seeks enforcement of these orders. The two cases spring from a common factual background and were consolidated before the Board. The orders are directed against refusals by the locals to handle "hot cargo," i.e., products received by a secondary employer from a primary employer with whom they have a labor dispute.

[HOT CARGO CLAUSE]

Crowley's Milk Company, Inc., the primary employer operates four large plants, where it manufactures and processes milk, cheese, ice cream, and other dairy products which it sells to numerous distributors. Crowley's em-

ployees are and were represented by other unions, and since 1948 Locals 338 and 680 have unsuccessfully attempted to become these employees' bargaining representatives. In 1955 the two locals adopted a common plan whereby on April 1, 1955, Local 338 would begin to picket Crowley's two New York plants and simultaneously Local 680 would start to picket Crowley's New Jersey plant. The locals were in a position to jeopardize Crowley's business relations with ice cream and milk distributors, because the employees of many of these distributors were members of the two locals. The distributors and the two locals were parties to several collective bargaining agreements containing the following hot cargo clause:[1]

> "It shall not be a violation of this agreement for members of the Union to refuse to handle material in the possession of the Employer received from any employer with whom Local 338, or Local 584, or Local 602, or Local 607, or Local 680 is directly engaged in a labor dispute, provided such material comes into the Employer's possession more than 48 hours after the union gives written notice to the Employer of the existence of such labor dispute. It shall not be a violation of this agreement for the members of the union to refuse to make deliveries to or pickups from any employer with whom Local 338, Local 584, or Local 602, or Local 607, or Local 680 is directly engaged in a labor dispute, provided such refusal occurs more than 48 hours after the union has given written notice to the Employer of the existence of such labor dispute."

Thus in the event of a serious dispute between Crowley's and these locals it was likely that the employees and perhaps the employers of some of Crowley's customers would be loath to handle Crowley's products. The cases are concerned with the unions' relations with these secondary employers; the unions' relations with the primary employer, Crowley's, are not before us.

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[1] In Local 680's contract the secondary employers also agreed that they would "not aid other companies in any fight that may be waged against the Union."

[FACTS OF CASE]

The facts of the case involving Local 338 are not disputed. On March 17, 1955, the local sent a letter to all employers who were parties to collective agreements with it, notifying them that the two locals were directly engaged in a labor dispute with Crowley's, reminding them of the hot cargo clause, and announcing: "We shall expect that, by or before April 1, 1955, you will discontinue receipt of any materials of Crowley's Milk Company * * * as long as this labor dispute continues." Edward Greco d/b/a Maple Grove Dairy was one of the secondary employers notified, and he replied that he would not co-operate for six to eight weeks, until he could get containers made up under his trade name for the by-products normally purchased from Crowley's. Negotiations between Greco and Local 338 continued until August 8, 1955, at which time Greco's employees, on instructions from the union, refused to handle Crowley's products. Greco did not acquiesce in his employees' refusal, but on August 9 posted a written notice on the bulletin board in the company drivers' room directing them to distribute and sell Crowley's products. Notwithstanding the notice, the employees on instructions from Local 338 refused to handle the products.

There is disagreement as to activities of Local 680, but it is clear that it sent notices almost identical to those described above to numerous secondary employers who were customers of Crowley's. These notices were also sent to union stewards of these secondary employers with the following explanatory note:

> "Dear Sir and Brother:
>
> "Enclosed find copy of letter that was sent to your employer. Please see to it that all members under your jurisdiction will abide by the enclosed letter."

It was stipulated that some stewards posted these letters on the bulletin boards, and there is evidence that some

members of the union were informed of their contents by word of mouth. Since the Intermediate Report, which the Board majority adopted, does not resolve the conflicts in testimony as to the union's policy, we adopt for purposes of decision here the union's version that it encouraged the secondary employees to refuse to handle Crowley's goods after April 1 unless and until secondary employers gave direct orders to do so. In fact the union contended that its policy was even milder, eschewing "concerted" refusals under any conditions; but there is substantial evidence to support the finding that concerted action was sought.

[THEORY OF BOARD]

The trial examiner did not determine whether or not the secondary employers involved in the Local 680 case gave direct orders to handle hot cargo which the union ordered disobeyed. His reason, adopted by the Board, was that under recent rulings of the Board it is an unfair practice for a union to encourage concerted refusals to handle goods of other employers, regardless of employer acquiescence in the invocation of a hot cargo clause. The Board recognizes that these recent decisions are opposed to our holding in Rabouin v. N.L.R.B., 2 Cir., 195 F.2d 906, 29 LRRM 2617, and asks us to overrule that case.

This not the occasion for reversing ourselves in deference to administrative expertise, for the legal question is one of legislative intent and statutory construction as to which the courts are fully competent and, indeed, have the ultimate responsibility. Moreover, the present issue has divided the agency into three fragmentary views which seem to be still in the process of development. Having satisfied ourselves again that our former position appears sound, we reaffirm our earlier decision. In view, however, of the Board's new position and the division among the circuits, perhaps some further analysis is in order.

In the Board's first encounter with this problem a ma-

jority found no unfair practice where the union's concerted refusal was in accord with a hot cargo clause and the secondary employers acquiesced rapidly in the employees' refusal to touch hot cargo. The majority opinion stated three reasons for its result: (1) doubt as to whether the boycott was "secondary"; (2) the employers' rapid acquiescence after the union started the boycott; (3) the employer's advance consent embodied in the hot cargo clause. The Board explained the last ground, saying that where the employer consented in advance by putting such a clause in the collective bargaining agreement there was not " 'a strike or a concerted refusal in the course of their employment to use' etc. 'where an object thereof is: (A) *forcing or requiring*' " because the advance agreement of the employer deprived the later union acts of the requisite quality of insubordination. Rabouin d/b/a Conway's Express, 87 NLRB 972, 982, n. 29, 25 LRRM 1202, with Chairman Herzog concurring in the result and one member dissenting. We affirmed the Board's result, approving this third rationale. Rabouin v. N.L.R.B., supra, 2 Cir., 195 F.2d 906, 912, 29 LRRM 2617: "Consent in advance to honor a hot cargo clause is not the product of the union's 'forcing or requiring any employer * * * to cease doing business with any other person' § 8(b)(4)(A)."

[ELEMENT OF COERCION]

The statutory language is clear: there is no violation of § 8(b)(4) unless the union encourages the employees to *coerce* the secondary employer. Where the employees are encouraged only to exercise a valid contractual right to which the employer has agreed there is no coercion.[2] Nor-

[2] Accord, General Drivers, Chauffeurs, Warehousemen and Helpers Union, Local No. 886, AFL-CIO v. N.L.R.B., D. C. Cir., May 9, 1957, 40 LRRM 2049; Madden v. Local 442, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A.F.L., D. C. W. D. Wis., 114 F.Supp. 459, 38 LRRM

mally the secondary employer receives something at the bargaining table in exchange for granting the hot cargo clause, and he is no more coerced when the employees subsequently exercise their privilege than a landowner is coerced when those to whom he was granted licenses cross his land.

It will not do to say that encouraging work stoppages should be an unfair practice, even in the absence of secondary employer coercion because the effect on the primary employer and the public at large is the same although the secondary employer consents. There is some difference to the public between an ordinary boycott of which it had no warning and which may be called for any purpose and a refusal to handle strike-bound goods under the terms of a hot cargo clause. The latter stoppage is less vexatious because it can be anticipated and is limited to the situations prescribed in the clause. But even without such distinctions in effect the Congressional language is clear and we should not expand the prohibitions of the Act merely because the language which eventually emerged from the legislative struggle produces some anomalies. See Rabouin v. N.L.R.B., supra, 2 Cir., 195 F.2d 906, 912, 29 LRRM 2617.

Both the petitioners and the Board see in the legislative history some factors to support their respective positions. The Board points to the Congressional abhorrence of sec-

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2190; Contra: N.L.R.B. v. Local 1976, United Brotherhood of Carpenters and Joiners of America, A.F.L., 9 Cir., 241 F.2d 147, 39 LRRM 2428; Douds v. Milk Drivers and Dairy Employees Local No. 680, D. C. N. J., 133 F.Supp. 336, 341-342, 36 LRRM 2410 (dictum); Alpert v. United Brotherhood of Carpenters and Joiners of America, AFL-CIO, D. C. Mass., 143 F.Supp. 371, 38 LRRM 2420, noted 70 Harv. L. Rev. 735 (1957); Note, Hot Cargo Clauses as Defenses to Violations of Section 8(b)(4)(A) of the LMRA, 64 Yale L. J. 1201 (1955); cf. N.L.R.B. v. Local 11, United Brotherhood of Carpenters & Joiners of America, AFL, 6 Cir., 242 F.2d 932, 39 LRRM 2731.

ondary boycotts,[3] and the petitioners find indications that invocation of a hot cargo clause was not what the congressmen meant by "secondary boycott."[4] The Board stresses the interference with the public interest produced by any work stoppage,[5] and the petitioners point out that more recent efforts to get Congress to outlaw hot cargo clauses were defeated.[6] We do not think such tangential legislative history authorizes us to go behind the clear language.

[LATEST POSITION OF NLRB]

The Board's latest position, as we understand it, is that hot cargo clauses are not contrary to public policy, but that encouraging union men to exercise them is an unfair practice. This view started with the concurring opinion of Chairman Farmer in McAllister Transfer Inc., 110 NLRB 1769, 1788-1790, 35 LRRM 1281.[7] Chairman Farmer first stressed, as do we, the statute's requirement that the secondary employer be *coerced*. He then distinguished our Rabouin decision on the ground that the secondary employers there had immediately acquiesced in the boycott, whereas the secondary employers in the McAllister case "posted notices to their employees directing them to handle

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[3] 93 Cong. Rec. A-1222, 4198-4199, 4838, 4863; Sen. Rep. No. 105, 80th Cong., 1st Sess. 8, 22; Hearings before Senate Committee on Labor and Public Welfare on S.55 and S. J. Res. 22, 80th Cong., 1st Sess. 381-398, 1715-1729.

[4] These are collected in the dissenting opinion of Members Murdock and Peterson in McAllister Transfer Inc., 110 NLRB 1769, 1790-1799, 35 LRRM 1281.

[5] 93 Cong. Rec. A-1222, 4198, 4838, 4860, 4863.

[6] S. 2989, 83d Cong., 2d Sess., printed at 100 Cong. Rec. 6125; S. 3842, 84th Cong., 2d Sess., printed at 102 Cong. Rec. 8021.

[7] Prior to McAllister the Board decided Pittsburgh Plate Glass Co., 105 NLRB 740, 32 LRRM 1350, in which it not only reaffirmed its approval of our Rabouin decision, but buttressed it by construing the words in § 8(b)(4) "in the course of their employment" as requiring that the work which the secondary employees refuse to perform be work which they previously agreed to perform.

all freight without discrimination." 110 NLRB 1769, 1790, 35 LRRM 1281. He thus made determinative the secondary employer's reaction to the union's invocation of the hot cargo clause.[8]

Since Chairman Farmer's opinion this doctrine has undergone considerable change. In Sand Door and Plywood Co., 113 NLRB 1210, 36 LRRM 1478, enforced N.L.R.B. v. Local 1976, United Brotherhood of Carpenters and Joiners of America, AFL, 9 Cir., 241 F.2d 147, 39 LRRM 2428, a two-member majority declared that it was expressing "essentially the view expressed by Chairman Farmer in his concurring opinion in the McAllister case" and went on to amplify: "The employer, but not the union, may instruct his employees to cease handling goods sought to be boycotted. Until the employer instructs his employees that they need not handle the 'unfair' product, a strike or concerted refusal to handle such goods [is an unfair practice]."[9] In this version it is an unfair practice to invoke a hot cargo clause while the employer remains silent as to whether he acquiesces or not. Presumably the "majority" in the Sand Door case would not have distinguished Rabouin, but overruled it.[10] The Sand Door majority, whose language the present trial examiner took to be the law, did not discuss the requirement of coercion, but instead quoted selected passages from the legislative history demonstrating that the lawmakers were against secondary boycotts and in favor of the public interest.[11]

The doctrine received a further development in American

[8] Chairman Farmer's vote was decisive because two other members adhered to the original Rabouin decision and the two "majority" members thought hot cargo clauses were against public policy.

[9] 113 NLRB 1210, 1216, n. 20, 1217, 36 LRRM 1478.

[10] In addition to the "majority" opinion one member concurred on the ground that the clauses were against public policy and two members dissented, adhering to the Board's earlier view.

[11] 113 NLRB 1210, 1216, n. 21, 36 LRRM 1478.

Iron and Machine Works, Co., 115 NLRB 800, 37 LRRM 1395, enforcement denied General Drivers, Chauffeurs, Warehousemen and Helpers Union, Local No. 886, AFL-CIO v. N.L.R.B. D.C. Cir., May 9, 1957, 40 LRRM 2049. There a two-member majority, expressly relying on the Sand Door case, restated the doctrine as follows:

> "Thus, while Section 8(b)(4)(A) does not forbid the execution of a hot cargo clause or a union's enforcement thereof by appeals to the employer to honor his contract, the Act does, in our opinion, preclude enforcement of such clause by appeals to employees, and this is so whether or not the employer acquiesces in the union's demand that the employees refuse to handle the 'hot' goods. Accordingly, in affirming the Trial Examiner, we do not find it necessary to rely, as he did, on the fact that the secondary employers herein did not acquiesce in the refusal of their employees to handle American Iron's freight." [12]

In this most recent statement the reaction of the secondary employer has become wholly irrelevant, and there is still no explanation as to how the majority supplies the missing element of "coercion." Although only this latest position is urged upon us by the Board, we have considered both it and Chairman Farmer's original version and rejected them both. The latest Board view fails to distinguish between instances of employer coercion and instances of employer consent. Chairman Farmer's position, while recognizing the need for such a distinction, ignores the statutory language requiring a "strike" or "concerted refusal in the course of their employment." In the absence of a prior agreement, work to be done by employees is determined unilaterally by the employer; but where a collective agreement specifies the work to be done, that agreement defines the normal work of the employees and a "strike" or "refusal" must be a refusal to do that normal

[12] 115 NLRB 800, 801, 37 LRRM 1395. As in Sand Door, one member concurred and two dissented.

work. The employer obviously cannot impose additional work on the employees contrary to the agreement and then charge that their refusal to perform it constitutes an unfair practice. We see no difference in this respect between tasks exempted by the agreement because they are offensive to health or safety and tasks exempted because their performance is contrary to the interests of organized labor and, in this case, the local itself.

[PUBLIC POLICY]

We also do not accept the argument that hot cargo clauses are against public policy. The advocates of this view ignore the statutory language to talk about "secondary boycotts" and the undoubted Congressional dislike of them. Having assumed that refraining from work described in a hot cargo clause is a "secondary boycott," they frame the issue in terms of whether a hot cargo clause is a defense to a § 8(b)(4) unfair practice.[13] We cannot agree with this characterization of the issue. There is no need for a "defense" unless there has been a violation; and in determining the latter question we look to the statutory language, rather than the vague concept "secondary boycott," about which the legislators sometimes talked, but which

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[13] McAllister Transfer, Inc., supra note 4, 110 NLRB 1769, 1777-1786, 35 LRRM 1281; Sand Door and Plywood Co., 113 NLRB 1210, 1219-1229, 36 LRRM 1478, enforced N.L.R.B. v. Local 1976, United Brotherhood of Carpenters and Joiners of America, AFL, 9 Cir., 241 F.2d 147, 39 LRRM 2428, American Iron and Machine Works Co., 115 NLRB 800, 802-803, 37 LRRM 1395, enforcement denied General Drivers, Chauffeurs, Warehousemen and Helpers Union, Local No. 886, AFL-CIO v. N.L.R.B., D. C. Cir., May 9, 1957, 40 LRRM 2047.

they did not write into the Act.[14] For the reasons already given we hold that there is no "forcing," "requiring," "concerted refusal in the course of their employment," or "strike," and consequently no violation.

Petitions to review granted; orders reversed and enforcement denied.

Concurring Opinion

SWAN, Circuit Judge (concurring): I concur in the result. The Board recognizes that the orders are opposed to our decision in Rabouin v. N.L.R.B., 2 Cir., 195 F.2d 906, 29 LRRM 2617, and asks us to reconsider it. I am unwilling to reconsider a problem so recently passed upon by this court and have not done so. Consequently I would deny enforcement and reverse the orders on the authority of the Rabouin case.

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[14] See Note, Hot Cargo Clauses as Defenses to Violations of Section 8(b)(4)(A) of the LMRA, 64 Yale L. J. 1201, 1206 (1955). This point is recognized by the Senator who has introduced one of the bills cited in note 6 supra, designed to outlaw hot cargo clauses. After pointing out that the present statutory phraseology has not proven sufficient to cover all cases of secondary boycott and stating that "the present Board has adopted a more reasonable view of the matter," he goes on to urge that "the problem is so important that it should not be left to the opinions of appointees to administrative office. Congress must speak once and for all in regard to the matter." Explanatory Statement of Senator Curtis, May 14, 1956, introducing S. 3842 to amend § 8(b)(4) to outlaw hot cargo clauses, 102 Cong. Rec. 8022.

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Nos. 273, 324

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

NATIONAL LABOR RELATIONS BOARD, *Petitioners*

v.

GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL 886, AFL-CIO

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

LOCAL 850, INTERNATIONAL ASSOCIATION OF MACHINISTS, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

Nos. 273, 321

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL 886, AFL-CIO

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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LOCAL 850, INTERNATIONAL ASSOCIATION OF MACHINISTS, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE

I. INTRODUCTION

This brief *amicus curiae* is submitted by the Chamber of Commerce of the United States of America with the

consent of parties as provided in Rule 42 (2) of the Rules of the Supreme Court.

II. INTEREST OF THE CHAMBER OF COMMERCE OF THE UNITED STATES

The Chamber of Commerce of the United States is a federation, consisting of membership of more than 3,000 national, local and state chambers of commerce and trade associations, with an underlying membership of approximately 1,700,000 business firms and a direct membership of more than 21,550 business firms. Many members are engaged in businesses in interstate commerce or in businesses whose activities affect interstate commerce and are, therefore, subject to federal laws that affect the employer-employee relationship in these businesses. This brief is filed because the issue involved here is of utmost importance to members of the Chamber of Commerce of the United States.

III. ARGUMENT

A. Statement

Amicus curiae contends that the issue before the Court in these two conflicting cases is whether a private organization, a labor union, may insist upon a clause in a collective bargaining agreement with an employer which gives the union the power and authority to engage in an illegal secondary boycott as otherwise prohibited by the National Labor Management Relations Act.

In case No. 273 involving the Teamsters union, there also is the question whether such agreements in labor-management contracts can give the employees of common carriers the right to discriminate among shippers, consignees, or other carriers by refusing to serve such shippers, consignees, or carriers as required by their obligations under the Interstate Commerce Act.

B. Private Contracts and the Law

The contract clauses involved in these cases are popularly known as "hot cargo" clauses. Common among the Teamster and Building Trades unions, such contract provisions permit unionized employees to refuse to do business with non-union workmen, and refuse to handle products which do not contain "proper" union labels to indicate they were made by employers who hire 100 per cent unionized labor. The contracts also are used to organize more workmen and to win strikes and labor disputes by involving neutral third parties in a union's dispute or organizing drive.

The use of "hot cargo" contracts came into general use following enactment of the 1947 amendments to the National Labor Relations Act when unfair labor practices for unions were established and secondary boycotts were made a violation of the act.

Before the establishment of unfair labor practices for unions, the National Labor Relations Board and the courts refused to permit employers to bypass the law by negotiating private contracts with their employees. Such private contracts were considered against public policy. As a general rule, all contracts or agreements which, directly or indirectly, involve or have for their object a violation of the law, are illegal.

In at least two instances this Court has had occasion to rule on contracts that were alleged to have conflicted with the national labor relations policy. In *J. I. Case Co.* v. *NLRB*, 321 U. S. 332, 88 L. Ed. 762, 64 S. Ct. 576 (1944); the Court upheld the National Labor Relations Board in declining to recognize as a defense to a refusal to bargain charge, a number of individual contracts negotiated prior to an attempt to gain a collective bargaining agreement. At page 339:

> "Wherever private contracts conflict with its [the NLRB] function, they obviously must yield or the Act would be reduced to a futility."

A similar holding was made in the earlier *National Licorice Co.* v. *NLRB*, 309 U. S. 350, 84 L. Ed. 799, 60 S. Ct. 569 (1940); where it was found that contracts between an employer and his individual employees whereby the employees agreed not to demand a closed shop or a collective bargaining contract, were invalid.

(1) Public Policy of Labor Law

The pillar of the National Labor Management Relations Act is Section 7, which guarantees an employee's right to join a labor union and, at the same time, guaranteeing the employee's "right to refrain from any or all of such activities". An employer who has become a party to a union "hot cargo" contract has agreed to stop doing business at some future, indefinite time with an unnamed employer whom the union regards as "unfair". "Unfair", to the professional unionist, frequently means an employer who declines to force compulsory union membership upon his employees or may mean an employer who refuses to accept an unreasonable demand. When "hot cargo" contracts are used, as many of them are, to compel employers, at the peril of their business to coerce the employees of another employer to join a labor union, the purpose of Section 7 is being thwarted. At page 337 in *J. I. Case* v. *NLRB*, *supra*, the Supreme Court declared:

> "Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement."

If contracts may not be used to forestall union membership, by the same token, they should not be used to

force union membership, where employees have exercised their rights under Section 7 by refraining from accepting union membership.

(2). Who is the Public?

In one of the legal opinions which upholds the legality of "hot cargo" secondary boycott contracts, there is the belief that Congress, in writing the National Labor Management Relations Act and in adopting Section 8 (b) (4), the so-called secondary boycott provisions, was mainly interested in protecting secondary employers. This is the view of Circuit Judge Bastian in the case now before the court, No. 273, *NLRB* v. *General Drivers*, 247 F2d 71, 40 LRRM 2047. He writes:

> "The Board urges that Section 8 (b) (4) (A) was enacted for the benefit of the public. We think that, although the public is involved, this section has for its purpose the protection of those persons who might be subjected to a secondary boycott, which is proscribed by the section."

But a careful reading of the Act and other decisions indicates that the intent of Congress goes far beyond protecting a secondary employer from the unfairness of a union secondary boycott—Congress had the general public in mind. Congress so said in writing the Act's Declaration of Policy:

> ". . . neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public . . . interest;
>
> ". . . to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce."

In *National Licorice Co., supra*, Justice Stone discussed the public protection sought in the adoption of the earlier Wagner Act. At page 364:

"Here the right asserted by the Board is not one arising upon or derived from the contracts between petitioner and its employees. The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices. The public right and the duty extend not only to the prevention of his enjoyment of any advantage which he has gained by violation of the Act, whether it be a company union or an unlawful contract with employees, as the means of defeating the statutory policy and purpose. *Obviously employers cannot set at naught the National Labor Relations Act by inducing their workmen to agree not to demand performance of the duties which it imposes or by insisting, more than in a private litigation, that the employer's obedience to the Act cannot be compelled in the absence of the workers who have thus renounced their rights.*" (Italics ours)

The legislative history of the Taft-Hartley Act corroborates this continued attempt by Congress to protect the general public, not merely a secondary employer embroiled in a union unfair labor practice. On Page 8 of Senate Report No. 105, Part 1, April 17, 1947, 80th Congress, 1st Session, it was stated:

"Because of the nature of certain of these practices, especially . . . secondary boycotts . . . the committee is convinced that additional procedures must be made available under the National Labor Relations Act *in order adequately to protect the public welfare which is inextricably involved in labor disputes.*" (Italics ours)

* * * * *

"Hence, we have provided that the Board, *acting in the public interest and not in vindication of purely private rights*, may seek injunctive relief in the case of all types of unfair labor practices . . ." (Italics ours)

C. "Hot Cargo" Violates Section 8 (b) (4)

Before the adoption of the Taft-Hartley Act with its attempt to remove the double standards in labor law by establishing unfair labor practices for unions, the NLRB rightly refused to give effect to contracts, urged by employers, which the Board felt were contrary to the purposes of the Act. But when the first test came along in 1949, whereby a labor union sought by contract to evade the secondary boycott prohibitions of the new law, the NLRB upheld such an attempt. *Rabouin d/b/a Conway's Express* v. *NLRB*, 87 NLRB 972, enforced at 195 F2d 906 (1952).

Unfortunately the "hot cargo" principle in the case was dwarfed by other issues, and the dissenting opinion of the Second Circuit's holding even disregarded the "hot cargo" question. The majority opinion devoted but a paragraph to the "hot cargo" attempt to circumvent the new law. Not considering the public policy effect, the court held that "hot cargo" provisions were signed voluntarily by an employer and a union; therefore, there was no pressure upon employees to violate the Act.

Five years after this decision, the same circuit affirmed its earlier holding. *Milk Drivers Union* v. *NLRB*, 245 F2d 817, 40 LRRM 2279, (June, 1957).

In the meantime, however, other courts and the NLRB itself were beginning to refuse to follow the Second Circuit's view. In its *McAllister Transfer Co.* decision, 35 LRRM 1281 (1954), 110 NLRB 224, and *Local 1976, Brotherhood of Carpenters* (Sand Door), 113 NLRB 1210, 36 LRRM 1478 (1955); the Board specifically reversed its earlier *Conway* decision, holding that "hot cargo" boycott contracts were unenforceable and, consequently, no defense to a violation of section 8 (b) (4).

The Board's new view was affirmed by the Ninth Circuit in the *Local 1976 Carpenters* case, 241 F2d 147, 39 LRRM 2731. The Sixth Circuit in *NLRB* v. *Local 11, United Brotherhood of Carpenters*, 242 F2d 932, also followed the Ninth Circuit. At Page 936 the court remarked:

> ". . . the primary purpose of Congress in enacting Sec. 8 (b) (4) (A) was to protect the public interest from strikes or concerted refusals interrupting the flow of commerce at points removed from primary labor-management disputes. To allow the acquiescence of a single employer to validate conduct contrary to the express language of the statute would be to frustrate this Congressional purpose."

In fact the Court called attention to the view of an NLRB member that "hot cargo" contracts are contrary to public policy. Member Rodgers in his Sand Door opinion said:

> "No amount of ingenuity can change the simple fact that a 'hot cargo' contract is nothing more than a device to immunize in advance the very conduct which Congress in response to a dire public need sought effectively to eliminate. To permit a form of legal sophistry to make possible so flagrant a subterfuge for continuing this well-known abuse in labor disputes is to make a mockery of one of the most significant provisions which Congress wrote into the Act."

Others also have recognized the attempt by union officials to evade the law via "hot cargo" contracts. Writing in the *University of Cincinnati Law Review*, Vol. 23, No. 1, 1954, Page 53, Robert H. Wessel, an economics professor, and John A. Lloyd, Jr., of the Cincinnati bar both saw through the veil of "hot cargo":

> "The 'hot cargo' arrangement is nothing more than the old secondary boycott clothed in a new raiment of would-be respectability. But the sheep's clothing should not conceal the wolf from the eyes of the law."

But in the 2-1 decision by the Court of Appeals for the District of Columbia (NLRB v. General Drivers, 247 F2d 71, 40 LRRM 2047) one of the cases herein, the majority followed the Second Circuit's 1952 decision upholding the legality of the boycott contracts. But, Judge Prettyman in the dissent had no difficulty in seeing the violation in such contracts. He summed up his opinion:

> "In a nutshell my view is that the hot cargo clause cannot be enforced by a strike, because such a strike or refusal to work is flatly forbidden by Section 8 (b) (4) (A) of the Act."

He added that it may be that rights given in Section 8 (b) (4) (A) may not be nullified by contract and that Section 7 rights cannot be contracted away, but that he would not attempt to decide those questions.

But Congress specifically showed its intent not to permit a private contract to overrule the provisions it set out in Section 8 (b) (4). Section 10 (a) of the National Labor Management Relations Act reads:

> "The Board is empowered . . . to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. *This power shall not be affected by any other means of adjustment or prevention that has been established by agreement, law, or otherwise.*" (Italics ours)

Commenting on union contracts to violate Taft-Hartley, the NLRB trial examiner in the *Local 1976 Carpenters case, supra,* said:

> ". . . I would find that a labor organization may not immunize itself from the interdictions of Section 8 (b) (4) (A) in such fashion. I know of no other situation cognizable by the Board under the Act where private arrangements are given such wide and effective sweep in apparent derogation of public policy. Freedom to contract is precious, but not without circumscription familiar to the law."

Although the Second Circuit is quoted as the primary authority for the legality of hot cargo boycott contracts because of its two earlier decisions, a decision as recent as October 2, 1957, indicates that this circuit may also want to reconsider its earlier findings. Asked to review a lower court injunction based on a hot cargo secondary boycott, Judge Moore in *Douds* v. *Milk Drivers Union*, — F2d —, 40 LRRM 2669; seems to express doubt at Page 2672 on "hot cargo" contracts, although he says the question was not before the court at that time:

> "To what extent employers and labor unions may by agreement modify or nullify (if at all) the laws enacted by Congress for the protection of the public is a question not presently before us."

A colleague, however, would go farther and examine the full question. In a concurring opinion, Judge Lumbard suggests the court "critically reexamine" its hot cargo decisions, explaining that they . . .

> "seem to me to be contrary to both plain statutory language and the intent of the Congress. . . . *If Congress intended to protect the public and, in the case of Sec. 8 (b) (4) (B) of the Labor Management Relations Act of 1947, primary employers, from the effect of secondary boycotts, and I believe it did so intend, other parties cannot insulate themselves by contract from such statutory prohibitions.*" (Italics ours)

(1) District Court Decisions

The weight of district court decisions on the granting of NLRB injunctions to stop hot cargo secondary boycotts outweighs district courts' refusing to enjoin the practices. Two of the more detailed district court opinions reveal:

Douds v. *Milk Drivers Local*, 133 F. Supp. 336; 36 LRRM 2410 (1955):

> "Then both the union and the secondary employer, by entering into this 'hot cargo' clause contract, *will*

have contracted to nullify the very protection of the public which the Taft-Hartley Act was designed to afford. It follows that if the 'hot cargo' clause thus violates in essence this important provision and intention of the statute, such clause is contrary to public policy and void." (Italics ours)

* * * *

Alpert v. *Carpenters Union*, 143 F. Supp. 371, 38 LRRM 2420 (1956):

". . . The fact among other circumstances, that the injunctive right is given to the Board, and not to the individual employer, indicates to me that *the protection is intended for more than that employer* . . . The public at large, particularly where interstate commerce is involved, is interested in not having strikes extend far afield." (Italics ours)

* * * *

District Court decisions in *Roumell* v. *Plumbers Local*, 151 F. Supp. 706, 40 LRRM 2104, (1957); *LeBuss* v. *General Drivers, Local 984*, 40 LRRM 2635, (Sept. 14, 1957); and *Madden* v. *Teamsters*, 114 F. Supp. 459, 38 LRRM 2190 (1956), also hold with decisions against hot cargo clauses.

D. Interstate Commerce Act Violation

When Local 886 of the Teamsters union induced its members to refuse to handle interstate freight shipments brought by the American Iron and Machine Works Co. to the terminals of the five truck lines operating as common carriers under authority of the Interstate Commerce Commission, the obligation of the Interstate Commerce Act to serve all shippers without discrimination was breached. 49 USCA 316. A common carrier and its employees have the legal duty to serve all shippers, consignees, or connecting carriers without discrimination or partiality.

"The transportation employee, rail or motor, is charged with duties to the industry, to the shipper

and to the public. The loyalty of the employee to the carrier, rail or motor, is inherent in his job, just as loyalty to the government prevents interruption to the public business in federal employment." *Montgomery Ward* v. *Northern Pacific Terminal Co.*, 128 F. Supp. 475 *at* 500, 32 LRRM 2386 (1953).

When unions representing employees in the interstate transportation industry urge "hot cargo" clauses, which give the union the power to dictate who should be permitted to ship on the nation's highways, they are violating the law. They may not successfully contend that the National Labor Management Relations Act permits collective bargaining agreements that nullify the Interstate Commerce Act. The court in *Montgomery Ward* v. *Northern Pacific Terminal Co.*, *supra* particularly emphasized the obligation of a common carrier to serve the public impartially. At Page 494:

> "The suggestion that these obligations have been abrogated or essentially modified by statute law or policy is unthinkable. In the preservation of these obligations, the public at large—not any class or clique—is vitally concerned. Indeed, the nation will not long survive their destruction."

State tribunals also have recognized that Teamster "hot cargo" contracts are violations of free interstate commerce. In *Drivers Union* v. *American Tobacco Co.*, 264 SW 2d 30, 32 LRRM 2259 (1953), the Kentucky Court of Appeals held:

> "The rule of law that *common carriers and their employees must serve all members of the public without discrimination* is firmly established in Kentucky, and so far as we can find, in all states. Its origin goes back into the common law."
>
> "*The legal duty of a common carrier* to handle the merchandise of a shipper without discrimination *existed long before the contract* came into being, *and, by like token, employees of common carriers*, as long as they voluntarily remain in the hire of their employer, *do not have the lawful right to withhold their*

services from a particular customer who deals with their employer." (Page 2263) (Italics ours)

The Tennessee Court of Appeals in their 1956 decision in *Aladdin Industries v. Associated Transport*, 298 SW 770, 38 LRRM 2559; held:

> "Appellants rely on the provisions of the collective bargaining contract above quoted. That merely said it would not be a breach of the contract if an employee refused to go through the picket line of a union or to handle 'unfair' goods. *That contract could not bind third persons or affect the rights of the public, the contract would be illegal and void.*" (Italics ours)[2]

This Court had occasion to rule on the question of private contracts as an interference with the free movement of interstate commerce. Although the cases cited herein primarily concern violations by carriers, the principle of not permitting private contracts to supersede the Interstate Commerce Act is the same whether a carrier voluntarily signs such an agreement or whether a union, representing the carriers' employees, forces such a contract.

More than 45 years ago this Court refused to enforce a contract by a carrier for free passenger service given in exchange for a release for personal injury claims against the carrier. In *Louisville & Nashville Railroad Co. v. Erasmus L. Mottley*, 219 U. S. 467, 55 L. Ed. 297, 31 S. Ct. 265 (1911); Justice Harlan declared:

> "There is no provision excepting special contracts from the operation of the law".

In *U.S. v. Pennsylvania Railroad Co.*, 323 U. S. 612, 98 L. Ed. 499, 65 S. Ct. 471 (1945); the Court held that

[1] This Court at 348 U. S. 978, 75 S. Ct. 563, 99 L. Ed. 762 (1955) reversed the decision, the reversal was on jurisdictional grounds and not on the interpretation of the law.

[2] Reversed on jurisdictional grounds. McCrary et al. v. Aladdin Industries, Inc., 355 U. S. ____, 10 LRRM 2679 (Oct. 14, 1957)

railroads could not refuse to establish certain joint through rail-water routes with a car ferry service carrying freight between Brooklyn and New Orleans. The refusal was the result of a rule promulgated by what is now known as the Association of American Railroads because of rail-water competition over this particular route. Here we have the Teamsters, fearing competition from carriers whose men do not want to join their union, insisting that union carriers not do business with shippers who are in the midst of a labor dispute or whose employees may not want to join a labor organization.

In a third decision, the Supreme Court held in *U. S. v. Baltimore & Ohio Railroad Co.*, 333 U. S. 169 @ 175, 92 L. Ed. 618, 68 S. Ct. 494 (1948):

> "It would be strange had this legislation left a way open whereby carriers could engage in discrimination merely by entering into contracts for the use of trackage. In fact this court has long recognized that the purpose of Congress to prevent certain types of discriminations and prejudicial practices could not be frustrated by contracts."

It is obvious that no private contract, regardless of its purpose, can be used to frustrate the intent of the Interstate Commerce Act to discriminate among the users of interstate commerce. Because union "hot cargo" contracts are designed to prevent the public from using the normal transportation avenues of interstate commerce, they should be struck down without further delay.

As recently as November 13, 1957, the NLRB decided that union "hot cargo" contracts with common carriers are invalid *per se* under the National Labor Management Relations Act. *Truck Drivers and Helpers Local Union 728 et al. v. Genuine Parts Co.*, 119 NLRB No. 53. The principal opinion in the Board's decision points out that under the Interstate Commerce Act carriers and their employees are not free to decide, at will, to withhold their services to a particular customer or class of customers.

". . . it is not our intent, in making reference to the provisions of the ICA to judge the actions of the common carriers subject to the ICA. Our purpose is narrowly limited and can be summarized as follows: We have been commissioned by the Supreme Court not to ignore the other and equally important statutory schemes in administering our statute. The carriers before us are subject to the ICA—a scheme designed, like ours, to facilitate the flow of commerce . . ."

"We are satisfied, on the basis of the legislative history of the Act as it throws light on the objectives of the Congressional scheme embodied in Section 8 (b) (4) of the (Taft-Hartley) Act, that the 'hot cargo' contracts here involved are repugnant to the basic policies of the Act and in conflict with the public rights this Board is under a duty to protect."

IV. SUMMARY OF ARGUMENT

In the words of the late Senator Taft, the intent of Congress when it enacted the 1947 National Labor Management Relations Act was to bring an end to all secondary boycotts by labor unions. During the course of legislative debate on the measure, Senator Taft at 93 Cong. Rec. 4198, 1st Session (April 29, 1947) declared:

"Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have so broadened the provisions dealing with secondary boycotts so as to make them an unfair labor practice."

It is the contention of *amicus* that a union may not use a collective bargaining contract to nullify the Act's intent to protect the public from secondary boycotts. Such contracts which contain "hot cargo" clauses not only violate public policy as established by the Act, but breach its Section 8 (b) (4) prohibitions.

In regard to case No. 273 before this court, *amicus* urges that the Court find the Teamsters union failed in

its duty to comply with provisions of the Interstate Commerce Act as well as the Labor Management Relations Act. The result of "hot cargo" clauses in labor-management agreements is to restrict and burden the free movement of interstate commerce. In some instances the result is to cut off all commerce for certain shippers, consignees, or carriers who happen to incur the wrath of a Teamster union official.

We urge that this Court go beyond the limited findings of the National Labor Relations Board which holds that "hot cargo" contracts are no defense to a violation of Section 8 (b) (4); and that such contracts are illegal *per se* only when made by a union and a common carrier. In our view, such contracts, in whatever industry they exist, not only fail to offer a defense to a violation of the law, but the very making of such contract is objectionable to the purposes of the National Labor Management Relations Act. This Court should declare them invalid *per se*.

V. CONCLUSION

For the reasons stated, we respectfully submit that "hot cargo" provisions in collective bargaining agreements are contrary to public policy, and in violation of both the National Labor Management Relations Act and the Interstate Commerce Act.

We ask that this Court reverse the United States Court of Appeals for the District of Columbia Circuit in case No. 273, and hold that the so-called "hot cargo" clause in a labor-management collective bargaining contract is in violation of public policy and the law. In case No. 324 we ask that this Court make clear that no employer or labor organization have the legal right to enter into collective bargaining contracts that include clauses providing for a built-in secondary boycott, and that such clauses, whether they masquerade as "hot cargo," "standard form

of agreement," or involve any such principle, be declared illegal *per se*.

Respectfully submitted,

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PROOF OF SERVICE

I, William B. Barton, one of the attorneys for the movants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the —— day of December, 1957, I served copies of the foregoing BRIEF AMICUS CURIAE on the several parties to the principal case as follows:

1. On the appellants, National Labor Relations Board, by mailing a copy in a duly addressed envelope with first class postage prepaid to the Office of the Solicitor General: J. Lee Rankin, Solicitor General, Washington 25, D. C.

2. On the appellants, Local 850, International Association of Machinists, AFL-CIO, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to their attorney of record: Plato E. Papps, 1300 Connecticut Avenue, N. W., Washington 6, D. C.

3. On the appellees, General Drivers, Chauffeurs, Warehousemen and Helpers Union, Local 886, AFL-CIO, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to their attorney of record: Herbert S. Thatcher, 1009 Tower Building, Washington 5, D. C.

.....

William B. Barton

Office - Supreme Court, U.S.
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DEC 23 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 273

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 886, AFL-CIO

No. 324

LOCAL 850, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE AMERICAN TRUCKING ASSOCIATIONS, INC., AS AMICUS CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 273

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 886, AFL-CIO

No. 324

LOCAL 850, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE AMERICAN TRUCKING ASSOCIATIONS, INC., AS AMICUS CURIAE

American Trucking Associations, Inc., submits this brief *amicus curiae* to the Court in the genuine belief that it will aid the Court in the resolution of some of the issues presented. The parties consented to the filing of this brief in accordance with Rule 42(2).

STATEMENT OF THE CASE

These cases are before the Court on writs of certiorari to the Court of Appeals for the District of Columbia Circuit. The decision to which these writs were directed arose out of a review of an order of the National Labor Relations Board (referred to herein as "the Board") sustaining a complaint alleging that Petitioner in Case No. 324 (referred to herein as "the Machinists") and Respondent in Case No. 273 (referred to herein as "the Teamsters") had violated Section 8(b)(4)(A) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151 *et seq.*) (referred to herein as "the Act"). This subsection so far as relevant reads as follows:

> "Sec. 8(b). It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * * *
>
> (4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * *"

The asserted violations of the Act occurred during an economic strike between the Machinists Local and American Iron and Machine Works, a manufacturing company in Oklahoma City, Oklahoma. The Machinists picketed the plant and the company thereupon

delivered freight in its own trucks to the loading platforms of the trucking carriers in Oklahoma City. The Machinists appealed to the employees on the platforms not to load the trucks of their employers with American Iron freight. The carriers (with the exception of Lee Way Motor Freight Lines) told their employees to do so, however, although each of the carriers was a party to a multiple-employer contract with the Teamsters, known as the "Oklahoma City Cartage Agreement" which contained the following clause (R. 187):

> "Members of the Union shall not be allowed to handle or haul freight to or from an unfair company provided this is not a violation of the Labor Management Relations Act of 1947."

All the trucking companies involved were common carriers for hire engaged in the business of hauling freight by motor vehicle under license from the Interstate Commerce Commission and had customarily carried freight for American Iron (R. 4). The Teamsters then instructed the carrier employees who were covered by the area contract to refuse to receive, check or otherwise handle American Iron freight, according to the allegations of the complaint (R. 5-7, inc.). The Teamsters admitted these allegations (R. 9, 10) but pleaded as an affirmative defense that the instructions given the employees had been for the purpose of "complying with the contract."

The Trial Examiner, relying upon the Board decision in *McAllister Transfer*, 110 NLRB 1769, held that both unions had violated Section 8(b)(4)(A) with respect to their activity concerning the employees of all the carriers except Lee Way, the company which had not ordered its dock employees to handle the

picketed American Iron shipments. The Board not only sustained these findings against the unions, but also found illegal their conduct with regard to the employees of Lee Way. According to the majority opinion, all the elements of a violation of Section 8(b)(4)(A) were present when the unions directly appealed to the carrier employees to engage in a concerted refusal to handle American Iron products. Citing their recent decision in the *Sand Door*[1] case, the Board said unions were prohibited from instigating employees of a secondary employer to cease handling the goods of any employer, irrespective of any hot cargo contract and such instigation was not excused by subsequent failure of any secondary employer to countermand the unions' instructions because proof of direct union inducement of his employees was sufficient. Member Rodgers, whose vote was necessary to the majority, concurred, but on the broader ground that the hot cargo contract was contrary to public policy. Members Murdock and Peterson dissented on the ground that the conduct of the unions was lawful under the hot cargo clause.

In the Court of Appeals each of the three judges assigned to the case wrote a different opinion. Judge Bastian, writing the principal opinion, declared that because of the hot cargo contract, there was no violation of the Act on the part of the Teamsters. In his view the instructions against the handling of American Iron freight was simply an exercise by that union of a valid contractual right conferred upon it by its contract with the carriers.

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[1] *Sand Door & Plywood Co.*, 113 NLRB 1210, 17 aff'd sub. nom. *N. L. R. B. v. Local 1976, United Brotherhood of Carpenters, etc.*, 241 F. (2) 147 (CA 9). This decision is also before this court for review.

The Machinists who had also relied upon the hot cargo contract as a defense, fared differently, however, Judge Bastian taking the position that since that union was not in privity of contract with the carriers, its conduct was not excused by the contract between those employers and the Teamsters.

Judge Washington concurred with his view respecting the Teamsters and accordingly the Board order against that union was set aside. Judge Washington disagreed, however, with the disposition his colleague proposed to make of the order against the Machinists, pointing out that since Judge Bastian was relying in the Teamsters case upon the theory that what was being induced was not a "strike or refusal to work" with an object of "forcing or requiring" because the employers had agreed to go along with the boycott action, his ruling should also apply to the Machinists conduct. As Judge Prettyman, agreeing with the Board, objected to setting aside the order against either union, the distinction between the two unions made by Judge Bastian became the majority view.

As it is our position that the hot cargo clause was not a defense to the conduct of either the Teamsters or the Machinists, we will not advert further in this brief to Judge Bastian's distinction, but shall argue that the court below erred in setting aside any portion of the Board order.

THE INTEREST OF THE AMICUS CURIAE

The amicus, a corporation with offices in Washington, D. C., is a federation of affiliated associations of trucking employers operating in every state in the union. The great bulk of the trucking industry is unionized. Most trucking employers bargain with various subordinate bodies of the International Brother-

hood of Teamsters through some 75 employer associations which negotiate contracts on a local or regional basis.

The increasing dependency of the economy of the entire nation upon the trucking industry is apparent. Twenty-five thousand communities depend entirely upon trucks for the movement of their overland freight and seventy-five percent of all freight in the United States moves at one time or another by motor truck. The industry is a conglomeration of small businesses. According to the research department of the Association, the 20,000 motor carriers which are required to report to the Interstate Commerce Commission have an average of only 22 employees and only 3000 of these carriers have annual revenues exceeding $200,000. In addition to the companies reporting to the Interstate Commerce Commission there are also thousands of smaller unregulated carriers.

Paralleling the high degree of unionization in the trucking industry [2] has been the widespread incidence of hot cargo clauses in union agreements—provisions which in one form or another existed long before the Taft-Hartley Act. Under threats of strike many of the most important trucking employer associations have had to agree to the inclusion of these provisions in their contracts. A number of typical examples are cited in the appendix to this brief.

The industry has not been a willing party to these contracts and has taken the position in Congressional hearings that secondary boycotts should be effectively curbed. In 1953 Benjamin R. Miller, industrial rela-

[2] The United States Labor Department reports that 90% of the employees of common and contract carriers have been organized by the Teamsters.

tions director of the association, testified before the Senate Committee on Labor and Public Welfare that "decisions of the National Labor Relations Board circumventing the obvious intent of Congress have virtually made a farce of the secondary boycott interdictions of the National Labor Relations Act of 1947".[3] He stated the Association's position as follows:

> "Our industry is anxious that secondary boycotts implemented directly against truck operators be effectively restrained. But more vitally are we concerned with the use of the industry as the vehicle by which the secondary boycott is effectuated against other employers, unions, and employees other than our own. Witnesses who have appeared before your committee in the past, and those currently before the House Labor Committee, have stated that unions, with the reluctant aid of motor truck operators: Have forced employees of other companies into unions unwillingly; have forced other workers to change unions; and have brought other companies to their knees during work stoppages. To such allegations we cannot plead innocent. We hasten to state, however, that our industry is a most unwilling tool for such purposes and that our participation in them stems from our inherent vulnerability."

IMPORTANCE OF QUESTION PRESENTED

While the issue presented to the Court in this case is primarily one of statutory construction, *viz.*, the question of whether hot cargo contracts render unions immune for conduct which would otherwise be a violation of Section 8(b)(4)(A) of the Act, the answer to

[3] Hearings on Proposed Revisions of Labor-Management Relations Act, 83d Cong., 1st Sess., p. 743. At that time the Board was refusing to grant relief against boycotts if unions raised the defense of "hot cargo" or "struck work" contracts. *See Conway's Express*, 87 NLRB 972; *Pittsburgh Plate Glass*, 105 NLRB 740.

it will have major repercussions upon our national labor policy.

The basic principle of the Act—to which all of the specific provisions are merely ancillary—is the guarantee (embodied in Section 7) of freedom of the workers of the United States to decide for themselves whether or not to be represented by a union, and to select that union without interference.

The Act proscribes as unfair practices, conduct both by management and labor organizations, intended to coerce workers in their free choice. In short, the primary object of the Act was to free workers from the paternalism of management and unions. It was for this reason that the National Labor Relations Board was assigned the function of conducting elections by secret ballot in appropriate bargaining units, and given access to the courts to enforce the results of these elections. It is apparent that the safeguards provided by law are meaningless if powerful labor organizations, through exercising economic pressure upon employers, whose workers they do not represent, can compel them to deal with these unions in complete disregard of the wishes of the employees affected by such arrangements.

One of the worst abuses upon which revelations of the McClellan Committee have thrown the spotlight, is the continued use by labor organizations of the secondary boycott as an organizing device. Time after time it has been shown that the contracts which aggressive locals of the Teamsters have imposed upon reluctant employers and equally reluctant employees have been due to the ability of their organizers to force almost any small employer to capitulate by shutting off the delivery and pick-up of commodities. This is accomplished by directing members of the Teamster

Union to refuse to cross picket lines, or in the case of non-union trucking operators, to refuse to interline freight destined for carriage on a carrier designated as "unfair".

This practice has become so widespread that recently an examiner for the Interstate Commerce Commission refused to grant applications for certificates to a group of non-union carriers on the ground that the connecting carriers being unionized, had not and would not interchange cargo with them.[4] Obviously such practices conflict with the most fundamental policy of the Labor Relations Act—the right of employees rather than their employer—to decide whether or not they want to have a bargaining representative.

If the Teamsters may, with impunity, under hot cargo contracts continue to force their own union or some other labor organization upon employers without employee elections, their Executive Council will soon supplant the Board as the final arbiter on representation issues. This has been highlighted in informed newspaper articles dealing with the recent expulsion of the Teamsters from the AFL-CIO. On December 8, for example, *The New York Times* carried a front page story by its labor expert, A. H. Raskin, reading, in part:

> "ATLANTIC CITY, Dec. 7—The first rumblings of trouble came today in the wake of the ouster of

[4] Report of Examiner Driscoll in *Nebraska Short Line Carriers, Inc.*, I. C. C. No. MC-116067 (Sub. No. 2): "In this case the examiner found that the larger trucking companies operating out of Omaha, Nebr., were unionized and that their contracts with the Teamsters almost invariably contained hot cargo provisions. One of the unsuccessful applicants was a carrier whose employees had repudiated the Teamsters in a Labor Board election. In none of them apparently had the Teamsters union been certified as majority representative.

the International Brotherhood of Teamsters from the merged labor federation. But there were no immediate signs of any general outbreak of civil war on the labor front.

A Teamster local in Louisville threatened to end its four-month-long support of a strike headed by the chief author of the expulsion order. However, aides of James R. Hoffa, president-elect of the truck union, reported that they were trying to persuade the local to go along with the non-reprisal policy laid down by the Teamsters.

The strike involves fifty members of the United Hatters, Cap and Millinery Workers International Union employed by the Louisville Cap Company.

The union's president is Alex Rose of New York, chairman of the appeals committee at the convention here of the American Federation of Labor and Congress of Industrial Organizations.

It was the appeals committee that made the formal recommendation at yesterday's convention session to expel the 1,333,000-member truck union on charges of domination by corrupt leaders. Mr. Rose told the delegates that his own union was getting "splendid cooperation" from the Teamsters in its Louisville walk-out. He said the sole purpose of the ouster was to spur the union to rid itself of racket elements." . . .

The story does not mention the fact that this was a minority strike called by the Hatters Union for recognition, and that a petition for election was pending at that time. On December 9, the Board, over the objection of the Hatters Union, ordered a secret ballot of the employees.[5]

Two days before publication of the *New York Times* story, the *Wall Street Journal*, in an article relating

[5] *Lipschutz, et al. and United Hatters, Cap, & Millinery Workers Union*, NLRB Case No. 9-RM-159, dated December 9, 1957.

to the expulsion order, also reported on the admitted dependency of other unions upon the Teamsters in their organizing efforts:

> "Technically, expulsion means the A. F. L.-C. I. O. leadership would not countenance agreements between federations unions and the ousted Teamsters. . . .
>
> The federation's course on local Teamster-A. F. L.-C. I. O. relationships is perhaps founded more on necessity than on any magnanimity. Ouster from the federation will hardly diminish the Teamsters' vast economic powers; the truckers still will be quite capable of making or breaking strikes called by smaller, weaker unions—in or out of the A. F. L.-C. I. O.
>
> Take, for example, the Retail, Wholesale and Department Store Union, A. F. L.-C. I. O. It has about 150,000 members, about half of whom are in the New York area. To stage an effective strike, the union admits it needs help from the Teamsters who usually agree to stop deliveries to a struck store. Right now, friendly Teamsters are backing the retail union's strike against the shoe department of Bonwit Teller in New York." . . .

We earnestly submit to the Court that under the construction which Congress meant the Board to place upon Section 8(b)(4)(A), these boycotting tactics by the Teamsters Union are completely illegal, even though authorized by hot cargo contracts. We propose to show in the body of our brief that:

1. The language of the controlling subsection affords no support for the view that it does not prohibit stoppages induced by the operation of hot cargo clauses in collective bargaining contracts.

2. The legislative history of the Act demonstrates that Congress did not intend to countenance

secondary boycotts in industries where hot cargo contracts were prevalent and notorious.

3. Common carriers have no right to discriminate against any class of shippers and hence are not free to honor hot cargo contracts.

ARGUMENT

I. THE JUDICIAL HOLDING THAT SUBSECTION 8(b)(4)(A) OF THE ACT DOES NOT PROHIBIT STOPPAGES INDUCED BY UNION ENFORCEMENT OF HOT CARGO AGREEMENTS DOES VIOLENCE TO THE PLAIN WORDING OF THIS SUBSECTION

A. The Failure of Employees Because of Union Instructions to Handle and Reship Cargo Which Arrives on Loading Platform in Normal Course of Carrier's Business Certainly Amounts to a "Strike" or "Refusal" to Handle Unless Employees Were Acting Upon Specific Instructions of Their Employer With Regard to that Particular Freight

Whatever arguments may be drawn from legislative history, or considerations of public policy on the merits of hot cargo clauses, one thing at least seems crystal clear—the holding of the Board is supported by the plain wording of Section 8(b)(4)(A); the holding of the Court below is not. In the controlling opinion[1] of the Board, Chairman Leedom and Member Beaney stated that

> . . . while Section 8(b)(4)(A) does not forbid the execution of a hot cargo clause or a union's enforcement thereof by appeals to the employer to honor his contract, the Act does, in our opinion, preclude enforcement of such clause by appeals to employees, and this is so whether or not the employer acquiesces in the union's demand that the employees refuse to handle 'hot' goods. Accordingly, in affirming the Trial Examiner, we do not find it necessary to rely, as he did, on the fact that the secondary employers herein did not ac-

[1] This was the opinion in which Member Rodgers concurred.

quiesce in the refusal of their employees to handle American Iron's freight. In our view, it is sufficient that there was direct inducement of such employees by Teamsters not to handle such freight, with an object of forcing the secondary employers to cease dealing with American Iron.

Inasmuch as the relevant subsection of the Act makes it an unfair labor practice for a union (here, both the Machinists and the Teamsters) to ". . . induce or encourage the employees of any employer (here, the carriers) to engage in a *strike* or a *concerted refusal in the course of their employment* to . . . transport, or otherwise handle any goods, where an object thereof is forcing or requiring any employer . . . to cease doing business with any other person", (Italics supplied), it is apparent that all the elements of the conduct proscribed were present in the instant case, *i.e.*, inducement, refusal, and unlawful objective. Both the Machinists and the Teamsters encouraged employees of the carriers to refuse to load goods from American Iron on the trucks of their employers, for the obvious purpose of requiring the carriers to cease doing business with American Iron.

The Act does not provide "unless such strike or refusal was engaged in for the purpose of requiring their employer to comply with a contract he had already made excusing them from such work". Yet that is what the court below and the dissenting minority of the Board would read into the Act.

Paradoxically, however, both the court below and the Court of Appeals for the Second Circuit, which has also reversed the Board's rejection of a hot cargo clause as a defense to secondary strikes, profess to find support in the literal language of the subsection. These

courts reach this result by attributing to the Board opinion a preliminary finding or premise which is asserted to be inconsistent with the ultimate conclusion of the authors. Thus Judge Bastian, speaking for the court below, after correctly stating that the two Board members comprising the majority "held in effect that even assuming that the Act itself does not prohibit the execution of a hot cargo clause", went on to express his agreement "with the four members of the Board who held that the hot cargo clause was not violative . . . of Section 8(b)(4)(A). This seems also to have been held by the Second Circuit in the so-called *Conway* case [*Rabauin v. National Labor Relations Board*, 195 F. 2d 906, 912]".

Accordingly, he reasoned that the Board's disapproval of direct appeals by unions to employees covered by a hot cargo contract would "render nugatory the clause itself . . ."

> "Here the Teamster's conduct only consisted of urging the employees of the carriers not to handle freight from a company which they considered unfair. This was exactly what the carriers had agreed their employees would not be required to do. If an employer may lawfully agree that its employees will not be required to handle freight from a struck company, and such a situation arises, it is hard to see how it can be said that, simply because the employees do what they have the right to do, there was a strike or refusal to work. Nor can it be said that there was a forcing or requiring of an employer to cease doing business with another person, because the employer was only being *compelled* to live up to its own voluntary contract entered into in advance of the happening." [Emphasis supplied.]

We submit that Judge Bastian completely misconstrued the concession of the majority, *viz.*, that Section

8(b)(4)(A) did not forbid the execution of a hot cargo clause. It is one thing to say that a statute prohibiting the commission of a certain act does not necessarily proscribe the mere execution of a contract which contemplates the commission of such act. But it is quite another thing to infer therefrom that such a contract is valid and enforceable or that its performance would be lawful. Many examples come to mind. It is not illegal, per se, for an employer to enter into a contract for a 48 hour week at straight time rates. But the actual application of the contract conditions to an employee covered by the Fair Labor Standards Act is unlawful. Similarly—in the field of unfair labor practices—we doubt that any court would hold that a manufacturer who accepts a written order from an anti-union customer conditioned upon a promise to employ only non-union workers, thereby violates Section 8(a)(3) of the Act. It is obvious, however, that if the manufacturer carried out his promise by discharging union men and discriminating against union applicants, his contract would not be a valid defense in a prosecution under this sub-section.

Thus, there is no basis for Judge Bastian's inference[7] that because the mere execution of the hot cargo contract was not unlawful, the contract conferred "rights" upon employees which the unions could lawfully induce them to exercise. The prohibition against union inducement or encouragement of certain em-

[7] The undiscriminating character of this inference is indicated by the court's reference to "four members of the Board who held that the hot cargo clause was not violative of Section 8(b)(4)(A)". Obviously this reference is not only to the two Board members who held that the enforcement of the clause by appeals to the employees was illegal, but to the two dissenting Board members, Messrs. Murdock and Peterson, who contended that the contract was valid and enforceable for all purposes.

ployee action makes no distinction between employees who have a legal right to engage in a work stoppage and those who do not.

The court should also observe the self-contradictory character of the holding that "nor can it be said that there was a *forcing* or *requiring* of an employer to cease doing business with another person, because the employer was only being *compelled* to live up to its own voluntary contract entered into in advance of the happening". (Emphasis supplied.)

The words "compel", "force" and "require" are synonymous. Therefore, if a man is compelled to do something, it is difficult to understand why it cannot be said that he is being "forced" or "required" to do it. We concede that if an employer complies with a hot cargo contract by specifically instructing his employees not to handle goods from a struck plant which are on the loading platform, the requisite element of a "strike" or "refusal" are not present when the employees, pursuant to such instructions, do not reload the goods on a connecting carrier, even though in the normal course of business, the goods would have been reshipped in accordance with the bill of lading. But if the employer declines or merely fails to give them such instructions, it would certainly be in accord with the ordinary meaning of words to describe the employees' failure to reload because they were warned by a union that the goods were "hot", as a "refusal" to handle the goods. And if the ultimate object of thus forcing the employer to live up to his contract was to force or require him and other persons [8] to cease doing

[8] The Bastian opinion also relies, in part, upon the theory that Section 8(b)(4)(A) was intended only to protect secondary employers not "involved" in "the disputes of others" from being

business with American Iron—a point on which there is no dispute—then the instigation of the strike or refusal was precisely the kind of conduct the Act forbids.

The latest opinion of the Second Circuit expressly purports to rely upon the "clear language of the Act".[9] An examination of Chief Judge Clark's majority opinion discloses that far from giving effect to the precise wording of the subsection, the court adopted the same "semantic contentions" which were successfully urged upon the Court of Appeals for the District of Columbia and are stated at some length in the opinion of the dissenting Board members in the *Sand Door* and *McAllister Transfer* cases.[10] Thus, the court holds that there can be no "forcing or requiring" of any employer when there is advance consent to honor a hot cargo clause, overlooking the fact that if the employer

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pressured into breaking off business relations with a third person. Inasmuch as it is apparent that the carriers immediately affected by refusal of their employees to handle the American Iron shipments were not involved in the strike at that company, it is not easy to follow this reasoning. The court seems to find involvement in the fact that the Teamsters designated the products of the struck company as unfair. Assuming that this was involvement, the court overlooks the fact that the prohibition of Section 8(b)(4)(A) is not limited to the impact upon the secondary employer but refers to "forcing or requiring . . . any employer *or other person* . . . to cease doing business with any other person". Thus, the failure of the carriers to ship the goods delivered to them at their terminals would also cause connecting carriers to cease handling American Iron products and would cause customers and consignees of American Iron who were unable to obtain deliveries to look to some other supplier. Hence the language of the statute does not support the narrow purpose attributed to it by the court.

[9] *Milk Drivers Union* v. *N. L. R. B.*, 245 F. 2d 216, at 217, reversing *Crowley's Milk Co.*, 116 NLRB 1408.

[10] *Sand Door & Plywood Co.*, 113 NLRB 1210 (1955), enforced in *N. L. R. B.* v. *Local 1976*, 241 F. 2d 147 (C. A. 9); *McAllister Transfer Inc.*, 110 NLRB 769 (1954).

has repented of his bargain, the subsequent work stoppage or refusal to handle is an obvious method of "forcing or requiring" him not only to abide by his contract, but to cease doing business with the shipper. The opinion states:

> "The statutory language is clear: there is no violation of § 8(b)(4) unless the union encourages the employees to *coerce* the secondary employer. Where the employees are encouraged only to exercise a valid contractual right to which the employer has agreed there is no coercion. Normally the secondary employer receives something at the bargaining table in exchange for granting the hot cargo clause, and he is no more coerced when the employees subsequently exercise their privilege than a landowner is coerced when those to whom he has granted licenses cross his land."

The obvious answer is that one will search Section 8(b)(4) in vain for the word "coerce" which the court has italicized. But even assuming that the court was using the word "coerce" as a synonym for "force" or "require", it does not follow that the secondary employer is free from coercion when it becomes necessary to encourage concerted action by the employees to require him to honor the hot cargo clause.

Granted that a secondary employer like the hypothetical landowner who objects to licensees crossing his property may not plead duress in a suit involving the other parties' exercise of a contractual right, this does not necessarily mean that it is necessarily legal to induce persons to exercise their rights. The offences of barratry and maintenance, for example, do not depend upon whether the litigants encouraged to sue have valid causes of action. But even conceding, arguendo, that the hot cargo contract might be enforceable as between

the parties [11] thereto, one is startled by the proposition that a tort feasor by signing a contract with a stranger may render himself immune from liability to a third party injured by his conduct.

The Second Circuit opinion then went on to condemn the majority rationale of the Board decision now before this Court, stating that

> "In this most recent statement the reaction of the secondary employer has become wholly irrelevant and there is still no explanation as to how the majority supplies the missing element of 'coercion'".

Certainly any such approach to the instant case would overlook the fact that it was the employees and not their employers who refused to accept goods for trans-shipment from the American Iron truck, and to that extent forced the trucking company to discontinue its business with the shipper. Thus we urge this court to observe the difference between a situation where an employer's own refusal to accept certain goods for delivery precludes any possibility of a refusal to handle on the part of his employees, and the situation presented by this case where the employees refused to carry out an assignment on the ground that the contract excused them from doing so. Surely, unless words are deprived of their plain meaning, the latter conduct amounts to a "strike" or "refusal", even though the employer may by his previous contract have lost his legal right to insist on the assignment.

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[11] All that the hot cargo clauses purport to do is to prevent an employer from disciplining employees who refuse to handle blacklisted goods.

B. The Words "in the course of their employment" Are Not Co-extensive With a Collective Bargaining Contract

Most of the considerations advanced by the court below for holding that the hot cargo contract was an adequate defense to the Teamsters' conduct were first suggested by a majority of the Board in a decision which that agency has now repudiated, *Rabouin d/b/a Conway's Express*, 87 NLRB 972. As we have been at pains to point out, this reasoning is a strained and implausible construction of the language of Section 8(b)(4)(A). As two members of the Board (Chairman Herzog and Reynolds) had dissented in the *Conway* case on the hot cargo issue, the Board majority when the question was presented again in *Pittsburgh Plate Glass*, 105 NLRB 740, apparently decided that its rationale required some bolstering. In that instance the majority seized upon the words "in the course of their employment" as a supporting reason for asserting the absence of the requisite "concerted refusal". The Board stated:

> "Nor was their employees' refusal to handle Pittsburgh freight 'in the course of their employment' within the meaning of Section 8(b)(4)(A) for that employment as defined by the contract excluded from the required job duties work on unfair goods".

We contend that there is no basis for placing such a construction upon the phrase "in the course of their employment" even though Judge Clark in the Second Circuit court opinion, to which we have referred, *Milk Drivers Union v. N. L. R. B.*, 245 F. 2d 216, also leans heavily upon this theory. We think it is plain that the words "in the course of their employment" were simply inserted to refer to services performed within the scope of the employer-employee relationship, in contra-

distinction to unauthorized work which an employee might perform on his own, but for which he neither expects nor is entitled to compensation.

What the Teamster argument boils down to is that any services performed by an employee, even though within the contemplation of his employer and for his benefit, are outside the course of his employment unless the employee is required to perform them by collective bargaining contract under penalty of discharge or some other disciplinary action.

We submit that this view is untenable. It would mean that the employees of the carrier in this case would not have been entitled to pay for any time spent in checking, handling, or transporting freight from American Iron because they were not required to do so by contract once their union had designated this manufacturer as "unfair".

It is not unusual for collective bargaining contracts specifically to relieve employees of certain duties that might be regarded as onerous. If they perform them, however, at their employer's request, they are doing so in the course of their employment. Hence they would be entitled to wages under the Fair Labor Standards Act,[12] and if injured, to Workmens' Compensation. Many collective bargaining agreements, for example, provide that employees shall not be "required" or "allowed" (the word used in the contract drawn into issue here) to work for more than seven hours in any one day. Nevertheless, if they do work overtime when an opportunity presents itself, it is perfectly clear that they have a right to be paid.

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[12] *Keppler* v. *Republic Pictures*, 5 W. H. 90; *Pinkley* v. *Allied Oil*, 5 W. H. 267; *Lawley & Son* v. *South*, 140 F. (2d) 439 (CA 1), cert. den. 322 U. S. 746.

The Longshoremen and Harbor Workers Compensation Act (USC Title 3, Sections 901 to 950), uses the very words in Section 8(b)(4)(A), "in the course of employment". Under this Act which was consequently extended to private employment in the District of Columbia, workers are entitled to compensation for injuries "arising out of and in the course of employment".

A Supreme Court decision on the meaning of the phrase conclusively should dispel any notion that the term "in the course of employment" embraces only work which a collective or individual contract of employment requires the employee to perform. In *Voehl* v. *Indemnity Insurance Company*, 288 U. S. 162, it was held that under this language a warehouseman injured in his own automobile on his way to the warehouse was entitled to recover. The facts of this case show that his employer contemplated that he might ride back and forth from his home to the warehouse in his own automobile for he was entitled to be reimbursed for mileage. The record, however, in no way suggests that his employer required him to adopt this mode of transportation. In another case construing the same language the Court of Appeals for the District of Columbia held that a car washer employed at a garage who was killed after hours in a company car towing the car of another employee met his death "in the course of employment" as the work he was engaged in was for the benefit of his employer, *Lumbermen's Mutual Casualty Company* v. *Hoage*, 58 F. 2d 1072.

It is true that in Section 8(b)(4) and in Section 303 these words appear in a different context than in the context of the workmen's compensation acts. This does not mean, however, that Congress intended this phrase

to have a different meaning, for the real purpose of the authors of the Act in inserting this limitation in the relevant subsections is not obscure. In the absence of such language it might have been inferred that Congress was seeking to stop unions from inducing employees not only to refuse to handle or transport goods which they would normally handle in their places of employment, but also was prohibiting unions from inducing employees in their role of *consumers* to refrain from using certain automobiles, cigarettes, household utensils, or other products made by non-union manufacturers.

In order to preclude any such inference, the House and Senate Conferees used words of art which had acquired a definite meaning in other acts to make it clear that all that unions were forbidden from doing was to desist from causing employees who would normally handle certain commodities in the course of their employment duties to refuse to do so.

II. CONGRESSIONAL INTENT TO OUTLAW SECONDARY BOYCOTTS REGARDLESS OF HOT CARGO CONTRACTS IS CLEAR AND UNMISTAKABLE

A. The Sponsors of the Act Referred Specifically to Union Boycotts in Industries Where Hot Cargo Contracts Were Notorious

In the absence of clear and unequivocal language in the Act compelling the court below to reach the result it did in the *Teamster* case (No. 273) its construction of the statute can be defended only on the ground that the interdiction of secondary boycotts by Congress was not meant to apply to unions which were parties to and operated under hot cargo and struck work contracts. There is not a shred of evidence, however, to show that Congress had any such limited purpose.

On the contrary, the legislative history makes it plain that Congress was deeply concerned with the prevalence of secondary boycotts precisely in those areas where the custom and practice in union contracts sanctioned such conduct on the part of unions, *viz.*, the construction, trucking and printing industries.

In the building industry the attempts of the building trades unions in some metropolitan areas to discourage by union contract the purchase and installation of equipment not manufactured by union labor had become so notorious that during the late 30's the Department of Justice began a series of antitrust actions against building trades unions and contractors. Nearly all these cases were discontinued after the Supreme Court in *United States* v. *Hutchinson*, 312 U. S. 219 (1941), held that the effect of the Norris-LaGuardia Act had been to immunize secondary boycott activity unless collusion with employers was shown.

In one case, a private action by a manufacturer against an electrical workers union which had a contract with the construction companies in the New York metropolitan area under which the contractors agreed not to install any equipment not made by the union, the Supreme Court held that there was such collusion, *Allen-Bradley* v. *Local Union No. 3, Brotherhood of Electrical Workers*, 325 U. S. 797 (1945).

In explaining the kind of activity at which Sec. 8(b)(4)(A) was particularly directed, the Senate committee in reporting out the bill containing this subsection referred specifically to this case in stating that its purpose was to define as an unfair labor practice the kind of conduct in which Local No. 3 had indulged,

viz., a product boycott, sanctioned by a hot cargo clause.[13]

The same Senate report also reveals the committee's concern with the fact that the Supreme Court had been unable to pronounce as a violation of the anti-trust laws, the operation of a contract between the Carpenters Union and a group of San Francisco contractors under which the employers agreed not to have the union membership install any mill work or prefabricated material made outside the Bay area. *United Brotherhood of Carpenters* v. *United States*, 330 U. S. 395. This case is expressly cited in that portion of the report explaining what was meant by the term "labor organizations and their agents". S. Rept. No. 105, 80th Cong., 1st Sess., p. 21, I Legis. Hist., 427.

Thus, the sponsors of the bill made it unmistakably clear that the very thing they proposed to outlaw included activity engaged in under the protection of a struck work or hot cargo clause. Moreover the hearings before both the House and Senate Committees are replete with testimony about secondary boycotts by unions in the trucking industry which were carried on at the expense of farmers, food processors and brewers, (see particularly, the testimony of M. J. Mulvihill for Western Pensylvania Brewers Association, Hse. Hearings, 256-347; H. L. Strobel for Associated Farmers, *id.*, 702-741; P. C. Turner for Food Producers Council,

[13] "This paragraph [*i.e.*, Sec. 8(b)(4)(A)] also makes it an unfair labor practice for a union to engage in the type of secondary boycott that has been conducted in New York City by Local No. 3 of the IBEW whereby electricians have refused to install electrical products of manufacturers employing electricians who are members of some labor organization other than Local No. 3. (See testimony of R. S. Edwards, Vol. I, p. 176 *et seq.*, *Allen-Bradley Company* v. *Local Union No. 3, IBEW*, 325 U. S. 797)" S. Rept. No. 105, 80th Cong., 1st Sess., p. 22, I Legis. Hist., 428.

respecting produce markets in New York, Newark and Philadelphia, *id.*, 1840- 1849).

It is significant that some of these witnesses referred to contract clauses which gave the union either the right to make rules concerning the "physical movement of commodities received and delivered by the employer" (Hearings, 1845) or to "embargoes of hot milk" presumably authorized by contract (Hearings, 706). This testimony made a tremendous impression in the Senate where the language of Sec. 8(b)(4)(A) and (B) was drafted, as well as in the House. Senator Ball in offering an amendment to the Senate bill which would give private parties as well as the General Counsel authority to apply directly to the Federal District Courts for injunctions in secondary boycott cases, said that "in the Philadelphia, Baltimore and New York markets, the farmers hauling their produce are compelled to obey 100% every rule laid down by the Teamsters Union".[14] Although his amendment did not succeed, the relevant substantive language was incorporated into a substitute amendment, Section 303, where the unlawful action defined is identical with that in Section 8(b)(4).

As it is apparent from the Board's statement of the facts in *Conway's Express*, 87 NLRB 972, the first case in which it considered the problem, that hot cargo clauses were incorporated into Teamsters Union area contracts long before the Taft-Hartley Act was even thought of,[15] the attempt of the Senate to curb what

[14] Cong. Rec., May 9, 1947, 5038; Legis. Hist., 1351.

[15] Collective agreements with the Teamsters Union which are in the files of the American Trucking Association reveal that prior to the Taft-Hartley Act such clauses were not uncommon in area contracts for cartage companies and over-the-road carriers. See Appendix.

were viewed as high-handed tactics on the part of the Teamsters Union, must be looked upon as less than lialfhearted if the interpretation of the Act by the court below is correct. The hearings and debates as well as the committee report, however, make it obvious that the proponents of the Act never intended such a broad grant of immunity.

Another industry also mentioned in the Senate debates was the commercial printing industry, whose representatives had submitted a lengthy statement of their problems to the Senate Committee. Senate Hearings on S. 55 and S. J. Res. 22, pp. 2304-2319. This statement brings out that the "laws" of the principal printing trades union, the International Typographical Union, required every contract in the industry to incorporate by reference the General Laws of the Union (*Id.*, p. 2311). One of these laws was as follows:

> "Article III. Sec. 5. Subordinate unions at all times have the right to define as struck work composition executed wholly or in part by non-members, and composition on other work coming from or destined for printing concerns which have been declared by the Union to be unfair, after which union members may refuse to handle the work classified as struck work."

These excerpts from the legislative history of the Act demonstrate conclusively that Congress, far from approving of secondary boycotts permitted by contract, deliberately legislated to prohibit such practices.

B. Even the Unions Were Aware That the Act Did Not Countenance Hot Cargo Clauses

Until the surprising decision of the Board in *Conway* was handed down, unions themselves had no doubt that this was the Congressional objective. The Typograph-

ical Union, for example, denounced the Act as aiming at destroying three of its "historic prerogatives" *viz.*, struck work, closed shop and assertion of jurisdiction.[16] Accordingly, in an attempt to evade the Act it modified its standard struck work clause in an ingenious effort to disguise its real purpose.[17]

The contracts which the Board had occasion to review in *McAllister Transfer*, 110 NLRB 1769, and *Pittsburgh Plate Glass*, 105 NLRB 740, indicate that the strategists in the Teamsters Union recognized that the Taft-Hartley Act made it dangerous to insist upon their familiar hot cargo clauses. Instead of negotiating for such an obvious provision as a reservation giving the union the right not to have its members handle "unfair" goods, it was at first content with clauses which merely provided that individual employees would not be penalized for refusing to transport unfair goods.

The McAllister contract, as redrafted after the Board opinion in *Conway*, however, contained a notice to the carriers that in the event the old fashioned clause which had received the blessing of the Board in *Conway* "sustains or prevails on appeal to the higher Federal courts, this article will be renegotiated and rewritten to provide the union with the maximum protection afforded by such decision". 110 NLRB 1801.

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[16] *ITU (American Newspaper Publishers Ass'n.)*, 86 NLRB 951; *ITU, (Union Employers Section, Printing Industry of America, Inc.)*, 87 NLRB 1418, 1445, 1449.

[17] "The Employers' Section and its members will not undertake any activity which will in any sense undermine or jeopardize the Union's strength or security or the well being of its members. It is the intent of the Employers' Section and its members to limit composing room work to jobs *obtained on a normal* account basis." *ITU, etc.*, 87 NLRB, 1418 at p. 1477.

C. Congress Was Aware of Board and Judicial Precedent for Invalidating Contracts Contrary to Policies of the Act

Reference has already been made to the fact that the legislative history of Section 8(b)(4) reveals a Congressional intent to stop secondary boycotts, irrespective of contractual arrangements. Should the question then be asked as to why Congress omitted any specific language condemning hot cargo and struck work clauses, the answer is clear. A long line of Board decisions prior to the Taft-Hartley Act had shown Congress that the Board never gave effect to contracts which defeated the purpose of the statute, and even held attempts on the part of employers to get unions to agree to such contracts as unfair labor practices. These decisions were uniformly upheld in the Supreme Court. Illustrative of these cases is *J. I. Case Co.* v. *N. L. R. B.*, 321 U. S. 323, 337, where the Supreme Court held that the Board properly refused to recognize as a defense to a refusal to bargain charge with respect to a particular group of employees, a number of individual contracts negotiated with these same employees before there was a collective bargaining representative. A similar holding was made in *National Licorice Company* v. *N. L. R. B.*, 309 U. S. 350.

In *Medo Photo Supply Corp.* v. *N. L. R. B.*, 321 U. S. 678, the Court also held that an agreement on the part of a *majority* of the employees not to deal with their employer through a particular union was invalid as a defense to a refusal to bargain charge filed by this union, even though the consideration for the agreement which was proposed by a majority of the employees was a wage increase.[18]

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[18] Prior to the Taft-Hartley Act the Board was vigilant not only in setting aside contracts which it deemed contrary to the broad objectives of the Act, but also in holding employers who attempted

Since the Taft-Hartley Act has been passed the Board except with respect to hot cargo and struck work contracts has also uniformly taken the position that it will not only refuse to give effect to contracts which are expressly illegal, *e.g.*, contracts which contain closed shop or preferential hiring provisions, but even contracts which could be used to obtain results at variance with the Act. Thus, in the *Great Lakes Tankers* case[19] the Board pronounced as illegal those contracts requiring seamen to be hired through union hiring halls on the ground that the purpose was to discriminate against non-union seamen. Even where no discrimination has been shown in the operation of such contracts the Board has uniformly held that such contracts are no bar to an election petition by a rival union

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to effect or give effect to such agreements, guilty of unfair labor practices. *Bartell Mills Co.* v. *N. L. R. B.*, 111 F. (2d) 291, 292 (CA 4) (withdrawal of charge filed with NLRB);—see 18 NLRB 268, 279-280; *Stewart Die Casting Corp.* v. *N. L. R. B.*, 114 F. (2d) 849, cert. den. 312 U. S. 680 (recognition of majority union as representative only of employees who were union members); *McQuay-Norris Mfg. Co.* v. *N. L. R. B.*, 116 F. (2d) 748 (CA 7), modified on rehearing, 119 F. (2d) 1009, cert. den. 313 U. S. 565; *N. L. R. B.* v. *Louisville Refining Co.*, 102 F. (2d) 678 (CA 6) (negotiation with local, but not with national, union); *N. L. R. B.* v. *George Pilling & Co.*, 119 F. (2d) 32, 35 (CA 3) (organization by the union of the employer's competitors in the industry; see also 1 NLRB 349, 4 NLRB 596, 6 NLRB 1, and 37 NLRB 334); *Matter of Kellogg Switchboard & Supply Co.*, 29 NLRB 847 (termination of strike caused by employer's unfair labor practices); *Matter of Scripto Manufacturing Co.*, 36 NLRB 411, 426-428 (union incorporation or giving bond; additional bond cases to the same effect are 21 NLRB 1240, 1253, 20 NLRB 211, 228-229, 231-232; 74 NLRB No. 144); *Golden Turkey Mining Co.*, 34 NLRB 760 (withdrawal of charges).

[19] *National Maritime Union*, 78 NLRB 971.

or a minority group of employees, filed long before its expiration date.[20]

In the *ITU* cases,[21] where the Union attempted to circumvent the closed shop prohibitions in the statute by signing only contracts which could be cancelled on 60-days' notice, the Board properly denounced this conduct as a violation of Sections 8(b)(2) and 8(b)(3) on the ground that the union's purpose was to evade the impact of the interdiction of the closed shop by making its contracts of such short duration that it could cancel them should any non-union applicants for employment be hired.

Even in the instance of a union which waived its rights in order to secure other concessions in a collective bargaining agreement, the Board has held that such a waiver was invalid as it meant foregoing a right granted the union under the statutory scheme. See *Bethlehem Steel Co. (Sparrows Point Division)*, 89 NLRB 341, where the Board held that unions may not be asked to waive their right to be present at even the first step in the adjustment of grievances as provided in Section 9(a).

In view of this consistent line of precedents, uniformly upheld by the courts, it is difficult to understand why a majority of the Board have been hesitant to concur in Member Rodgers' consistent view (R. 67) that hot cargo contracts are also contrary to public policy. It is evident that such clauses not only nullify the purpose of Section 8(b)(4)(A), but in operation, as we

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[20] *American Export Lines*, 81 NLRB 1370; *Clayton & Lambert Mfg. Co.*, 83 NLRB 458; *Broadway Iron & Pipe Co.*, 83 NLRB 942; *Bedini Bros.*, 93 NLRB No. 82.

[21] 86 NLRB 951; 87 *id.* 1418.

noted in our preliminary statement, such contracts exert tremendous economic pressure upon employers to force their own employees into unions. Hence the existence of such contracts in large segments of industry brings duress upon employers to violate Section 8(a)(1) and 8(a)(3) of the Act.

There are judicial authorities which have recognized this. In a case which came before the Appellate Division of the New York Supreme Court the problem was the enforcement of an arbitration award giving effect to a contract clause under which the employer had promised to deal only with contracting firms employing members of the Union. The Court said:

> "The requirement that appellant [employer] shall send its cut fabrics for sewing only to contractors who employ exclusively members of the union is similar in nature and closely allied to the promise by appellant not to operate any 'non-union' factory itself. The object is to compel appellant to break its relations with its contractors who have been organized by [another union] unless they, in turn, break their collective bargaining agreements with [the other union], and discriminate without an election under the NLRA in regard to the hiring of their employees on the basis of union membership. The clear purpose is both to bring about the violation of existing contractual relationships and to exert economic pressure on contracting firms to violate the public policy of Section 8 of the National Labor Relations Act by coercing them to discharge their employees unless they change their union affiliation."[22]

[22] *Levinsohn Corp. v. Joint Board of Cloak, Suit, Skirt and Reefer Makers' Union*, 272 App. Div. 469, 22 LRRM 2153, reversed on other grounds, 299 N. Y. 254.

This aspect of the matter was pointed out also in a well reasoned opinion by Judge Denman, *Capital Service, Inc.* v. *N. L. R. B.*, 198 F. (2d) 20 (C. A. 9), declaring that irrespective of whether Section 8(b)(4)-(A) prohibits secondary boycotts invoked under a struck work clause, such activity has the effect of restraining and coercing the employees of the primary employer in violation of that section when the object of such activity is to secure recognition of a union which does not represent those employees. The Court said:

> "That the Board has sometimes, in enforcement cases, overlooked the possibilities of § 8(b)(4)(A) is suggested by what was said in Labor Board v. Rice Milling Co., 341 U. S. 665 at p. 672. The Board should be vigilant to see that what was sauce for the goose under the Wagner Act is now sauce for the gander under the Taft-Hartley Act.
>
> "Nothing could more strongly restrain Service's employees from retaining their non-union status or coerce them into joining the Bakery Union than stopping or making intermittent their employment by picketing with appeals to persuade the public to boycott the products of their work. The evidence shows that all of the picketed stores did cease to sell the products manufactured by Service's employees. Here is more than an appeal to the *employees* to persuade *their* action. Here is successful economic coercion tending to prevent them from exercising their right to work, by diminishing the public consumption of the product of their work."

From this examination of the authorities, we submit that only two conclusions are possible—

(1) The doctrine that contracts repugnant to the policies of the Act cannot justify conduct which would

otherwise be an unfair labor practice was so firmly imbedded in Board and Court decisions by 1947 that Congress deemed it unnecessary to use specific language in order to indicate to the Board that it should apply the same principle to the new unfair labor practices as enumerated in Section 8(b).

(2) Contrary to what the majority of the court below has said, contracts permitting unions or employees of secondary employers to indulge in product boycotts are repugnant to the policies of the Act,[23] for such contracts defeat the broad objectives of Section 7, Section 8(b)(1)(A), Section 8(b)(2) and Sections 8(b)(4)-(A) and (B).

D. In Any Event, Persons, by Entering Into a Contract, May Not Deprive a Third Person of Statutory Rights

During the period when the Board's doctrine on hot cargo clauses was the same as that enunciated by the court below in the *Teamster* case (No. 273), Senator Taft expressed surprise that any administrative or judicial tribunal should think that a contract between two persons could affect the statutory rights conferred upon a third party by the Taft-Hartley Act.[24] Yet this

[23] Even where they have not been enforced the Board has frequently held (see cases cited *supra*) that the existence in collective bargaining contracts of illegal compulsory membership clauses has a coercive effect upon the employees and hence the execution of such an agreement is an unfair labor practice. If the same principle were applied to struck work clauses—and there seems to be no reason why it should not—the Board should also hold contracts illegal *per se*, for there can be no doubt that the existence of such a provision encourages union employees to refuse to handle non-union goods, even though the union itself does not instigate the work stoppage.

[24] Prior to the Board's repudiating the rule announced in the *Conway* and *Pittsburgh Plate Glass* cases, Mr. Miller of the Ameri-

novel notion is implicit in the proposition that what it is illegal for a union to do in bringing pressure on a struck employer becomes lawful if it has a contract with somebody else which authorizes it to engage in the proscribed conduct against the contracting party.

Judge Clark in the *Milk Drivers* case was apparently aware of this possible flaw in his opinion, for he condemns the Board's current approach to the hot cargo problem by stating that—

> "Having assumed that refraining from work described in a hot cargo clause is a 'secondary boycott', they frame the issue in terms of whether a hot cargo clause is a defense to a § 8(b)(4) unfair practice. We cannot agree with this characterization of the issue. There is no need for a 'defense' unless there has been a violation; and in determin-

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can Trucking Associations, criticized these decisions in testimony before the Senate Committee on Labor and Public Welfare, asserting that as a result, the Teamsters had obtained such "contractual privilege . . . that they may boycott with impunity." The following colloquy ensued:

> "SENATOR TAFT. We have had a lot of cases where the truckers were forcing employers to require their employees to be organized, or to join the trucking union, although they were warehouse employees or otherwise.
>
> "MR. MILLER. That is correct, Senator Taft.
>
> "SENATOR TAFT. The act attempted to stop that. Does it stop it?
>
> "MR. MILLER. No; because all that has been said is that they must get a union contract. And their contractual privilege is such that they may boycott with impunity.
>
> "SENATOR TAFT. Third parties who are not party to this contract?
>
> "MR. MILLER. That is right.
>
> "SENATOR TAFT. Of course, the whole purpose of the provision is to protect the third party. And he does not make any contract." [Hearings on Proposed Revisions of Labor-Management Relations Act, 83d Cong., 1st Sess., p. 739].

ing the latter question we look to the statutory language, rather than the vague concept 'secondary boycott' . . . .

The pleadings in this case show how completely this observation distorts the grounds on which the current Board majority doctrine was based. The record shows (R. 2-8) that the complaint against the Teamsters makes no use of the characterization "secondary-boycott". Instead, it merely alleges specific actions by the Teamsters Union and its agents in inducing and encouraging the employees of designated carriers to refuse to receive, check or haul, American Iron freight (R. 5), and further alleges (R. 7) that an object of this conduct was to force the carriers in question to cease doing business with American Iron.

In its answer the Union admitted the allegations of inducement and encouragement to *refuse* (R. 9), but pleaded affirmatively that the activities of the agents of the Union "have been directed to the sole purpose of complying with its contract governing the situation with the employers involved herein" (R. 9-10).[25] Consequently, the charge that it is the Board which has framed the issue of a hot cargo clause in terms of a defense is baseless. The issue is posed in those terms by the very party relying on the hot cargo clause.

This Court has recognized repeatedly that while contracts may be valid between the parties who make them, they may not be enforced in a way which would deprive third persons of constitutional or statutory protections against discrimination, *e.g.*, *Shelley* v. *Kraemer*, 334 U. S. 1 (holding that restrictive covenants based on

[25] Under Section 102.20 of the Board's Rules and Regulations, a respondent relying upon an affirmative defense must set it forth in his written answer.

race do not violate any constitutional rights but judicial enforcement thereof is contrary to the Fourteenth Amendment); *Conley* v. *Gibson*, — U. S. —, October Term 1957, No. 7, released November 18, 1957, (holding that a collective bargaining contract fair and impartial on its face may not be administered so as to discriminate against rights of Negro employees in bargaining unit); see also, *Hurd* v. *Hodge*, 334 U. S. 24.

The Second Circuit also attempted to buttress its reasoning by stating:

> "It will not do to say that encouraging work stoppages should be an unfair practice even in the absence of secondary employer coercion because the effect on the primary employer and the public at large is the same although the secondary employer consents. There is some difference to the public between an ordinary boycott of which it had no warning and which may be called for any purpose and a refusal to handle strike-bound goods under the terms of a hot cargo clause. The latter stoppage is less vexatious because it can be anticipated and is limited to the situations prescribed in the clause. But even without such distinctions in effect the Congressional language is clear and we should not expand the prohibitions of the Act merely because the language which eventually emerged from the legislative struggle produces some anomalies. See Rabouin v. N. L. R. B., supra, 2 Cir., 195 F. 2d 906, 912, 29 LRRM 2617."

The notion that stoppages due to hot cargo activity are less vexatious because they can be anticipated and presumably avoided, is wholly theoretical. Because of limited rail facilities many manufacturing enterprises are almost completely dependent upon motor carriers in the procurement of supplies and the delivery of their products. An outbreak of hot cargo activity which results in the indiscriminate piling up of commodities

at various terminals and transfer points because of difficulties in interlining shipments, is productive of tremendous confusion. Shippers, consignees and truck companies sometimes spend weeks in tracing shipments delayed at one point or another in the transportation field by the capricious interference of union agents.[26]

III. BUT IRRESPECTIVE OF THE QUESTIONABLE VALIDITY OF HOT CARGO CLAUSES IN GENERAL, COMMON CARRIERS HAVE NO RIGHT TO AGREE TO DISCRIMINATE AGAINST PRODUCTS OF ANY SHIPPER OR CONSIGNEE

As we have previously pointed out, the general theory of the Board members and Federal judges who have held that the application of hot cargo contracts does not violate Section 8(b)(4)(A), rests on the assumption that because employers are legally free to pick and choose the persons with whom they will do business, they have equal freedom to contract in advance against doing business with a particular class of persons.[27]

We have contended, of course, that this conclusion is not necessary or logical, as the contract violates the statutory rights of third parties.

But wholly apart from this issue we submit that in this case at least, this justification is not available. We are dealing here with a boycott accomplished by invoking the hot cargo clauses contained in contracts with common carriers. Unlike most private employers, common carriers are not free to pick and choose the

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[26] See report of I. C. C. examiner in *Galveston Truck Line Corporation* case, MC-C-1922, subsequently upheld, see fn. 28, *infra*.

[27] We refer to the majority opinion of the Board in *Conway's Express (supra)*, the minority opinions in *Sand Door* and this case, as well as the underlying reasoning of Judge Bastian in the court below, and Judge Clark in *Milk Driver's Local* v. *N. L. R. B.*, 245 F. 2d 817.

persons with whom they shall deal. Under state and Federal law a common carrier, unless prevented from doing so by flood, storms, violence or other forces beyond his control, has an obligation to accept and deliver all goods which are qualified for carriage without regard to the identity of the shipper or consignee.

The record shows that the carriers involved here held certificates from the Interstate Commerce Commission licensing them to haul freight by motor vehicle. Consequently, under the Interstate Commerce Act they had no right to engage in discrimination against such a shipper as American Iron.

As the Commission this very week has aptly stated:

> "We are here concerned, not with the legality of the hot cargo clauses as such, but with the actions of the defendant carriers in relation to their obligations under the Interstate Commerce Act to the public, without regard to the terms of any contract which they may have executed with a third party. Clearly, a common carrier may not bargain away its statutory obligations to the public and thereby relieve itself of such obligations . . .
>
> "We think it beyond doubt that the Interstate Commerce Act imposes upon common carriers by motor vehicle subject to our jurisdiction the clear and unmistakable duty to provide adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce within the scope of their holding out to the public, and that they are obligated to accept and transport all freight offered to them in accordance with the provisions of their published tariffs. This duty is almost an absolute one; and, if the public is to be adequately protected, common carriers must be held strictly accountable for it performance . . .
>
> "We find no basis for the suggestion that the provision of the act and the duties and obligations

of common carriers thereunder are subordinate to requirements of labor unions . . . ."[28]

The foregoing holdings were made in connection with a complaint against some of the carriers in the instant case. It was predicated upon their failure to accept traffic from a connecting carrier which had been put on the union's unfair list. In the hearing on the complaint, the carriers, although claiming that the Oklahoma City Local Cartage Agreement (R. 187)—the language of which gave rise to the issue here—was imposed upon them by duress, nevertheless pleaded the hot cargo clauses in that contract as a defense to their refusal to interline freight with the complainant.

> "To approve the position of defendants would accord them and other carriers similarly situated immunity from violations of the Interstate Commerce Act, and substitute for the regulation of interstate common carriers now vested in this Commission an indirect control by labor organizations. For example defendants could sign a union contract, even under duress, providing that their union drivers could not be discharged or disciplined for failure to maintain drivers' logs as required by our safety regulations, and defendants would be excused from compliance with such regulations because to comply would subject them to threat of a strike . . . ." (Excerpt from I.C.C. decision, *supra*)

As the record in this case reveals no resort to threats or violence against any of the carrier employees, it becomes obvious that under the Interstate Commerce Act, these carriers were not free to decline to transport shipments from American Iron, as the minority of the Board and apparently a majority of the court below, assumed.

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[28] Decision of Interstate Commerce Commission in *Galveston Truck Line Corporation* v. *Ada Motor Lines, Inc., et al*, MC-C-1922 released mimeographed form on December 18, 1957.

It is true that neither the Board minority opinion nor the majority opinion of the court, were directed at anything except a construction of the Act administered by the Labor Board. Nevertheless, the obligations of a common carrier were called to their attention by a footnote in the dissenting opinion of Judge Prettyman.

This Court has held that in the enforcement of the Labor Relations Act, other Federal statutes should be taken into account. In *Southern Steamship Co. v. N. L. R. B.*, 316 U. S. 31, the Court was reviewing a decision of the Board holding that despite maritime legislation directed against mutinies, a strike aboard ship was concerted activity protected by Sections 7 and 8(a)(1) of the Labor Relations Act. The Court, in reversing an order of a court of appeals sustaining the Board, said (316 U. S. 31, at 47):

> "It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-minded that it may wholly ignore other and equally important Congressional objectives. Frequently, the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task."

We submit that this admonition destroys the basis of the Court of Appeals premise that the hot cargo contracts drawn into issue here were "lawful".

Since the opinion of that court was handed down, the Board in a 4 to 1 decision in which two of the members, Chairman Leedom and Jenkins who had hitherto not joined in the Rodgers' view that all hot cargo clauses were void as against public policy, held that because of the Interstate Commerce Act, such contracts were

certainly invalid so far as certificated common carriers were concerned. See *Truck Drivers Local Union No. 728 (Genuine Parts Co.)*, 119 NLRB No. 53. We commend the rationale of the majority opinion in that case and urge this Court, if it is reluctant to pass upon the broader issue of the validity of hot cargo clauses in general to hold that so far as the trucking industry is concerned, such contracts may not lawfully be entered into or enforced against common carriers.

CONCLUSION

We respectfully urge this Court to reverse the decision of the court below in Case No. 273, to affirm its decision in Case No. 324, and to remand the cases to that court with instructions to deny both petitions for review and to enforce the order of the National Labor Relations Board.

Respectfully submitted,

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December 21, 1957

APPENDIX A

The following is a partial compilation of "hot cargo" clauses in Teamster Union contracts with motor carriers when the Taft-Hartley Act became law:

"Central States" Agreement—Chicago, Ill.—Mich., Ohio, Ind., Ill., Wis., Minn., Iowa, Mo., N. D., S. D., Neb., and Kansas. *Changed*

> "It shall not be a violation of this contract if any employe or employes refuse to go through the picket line of a Union or refuse to handle 'unfair goods'. The Union agrees that in the event the Employer becomes involved in a controversy with any other Union, the Union will do all in its power to help effect a fair settlement."

"Southwestern Area" Agreement—Oklahoma City, Oklahoma—3003—Ark., Okla., Texas, La. *Changed*

> "The Employer shall not request nor instruct any employe to go through the picket line of a Union nor to handle 'unfair goods', declared so by the Unions signed to this Agreement. However, the Union agrees that in the event the Employer becomes involved in a controversy with any other Union, the Union will do all in its power to help effect a fair settlement."

"Southeastern Area" Agreement—Kingsport, Tenn.—Ala., Ga., Ky., Miss., Tenn., Fla. *Changed*

> "The Employer shall not request nor instruct any employe to go through the picket line of a Union nor to handle 'unfair goods', declared as such by the Unions signed to this Agreement. However, the Union agrees that in the event the Employer becomes involved in a controversy with any other Union, will do all in its power to help effect a fair settlement."

Birmingham, Alabama—2101—Local No. 612 *Now covered by Southeastern Agreement*

> Article 8.—No Violation of Picket Line
>
> "In case of a lockout or strike of any Union, it shall not be considered a violation of this Agree-

men9 for the members of the Local Union No. 612 to refuse to work or to handle, sign for, or haul such freight from such company, when such controversy is on, provided, however, that if any other means of transportation is being used where such controversy is on, then the members of Local Union No. 612 may be, at the discretion of the Union permitted to perform their usual duties for the Employer where such controversy is on, however, the Union agrees that in the event the Employer becomes involved in a controversy with any other Union, the Union will do all in its power to help effect a fair settlement."

Now covered by Southeastern Agreement

Mobile, Alabama—4065—Local No. 991

Article 6.—[Same as Birmingham, supra]

Now covered by San Francisco Agreement

Stockton, California—Local No. 439

Section 3. "Employes reserve the right to reject any freight or merchandise assigned to or from a strike area, when men and equipment are in danger, nor shall they be required to pass picket lines recognized by the parent body of Local No. 439, or the parent body of the Union establishing the picket lines; it being understood, however, that the Union is not in favor of sympathetic strikes and will do everything within its power to avoid them."

Now covered by Southeastern Agreement

Atlanta, Georgia—Local No. 728

Article 8. "In case of a lockout or strike of any Union, it shall not be considered a violation of this agreement for the members of this Local Union No. 728 to refuse to work or to sign for, handle, or haul such freight from such company, where such controversy is on, provided, however, that if any other means of transportation is being used where such controversy is on, then the members of Local Union No. 728 may be, at the discretion of the Union, permitted to perform their usual duties for the Employer where such controversy is on. However, the Union agrees that in the event the Employer becomes involved in a controversy with any other Union, the Union will do all in its power to help effect a fair settlement."

Detroit, Michigan—Local No. 299

Now covered by Central States Agreement

Article 5. Arbitration.—"It is expressly agreed that men covered by this Agreement will not be required to cross any bonafide picket line or do work on strikebound equipment."

Albany, New York—Local No. 294

Now covered by Western New York Agreement

Section 23. "A. The Union reserves the right to refuse to accept freight from, or to make pick-ups from or deliveries to establishments where picket lines, strikes, walkouts and lockouts exist.

"B. The Union agrees to notify the Employer of such refusal but agrees to deliver all freight received prior to giving of notification. However, this agreement to notify shall not apply to disputes involving the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America or any of its local unions."

Binghamton, Syracuse, Utica, Auburn, Elmira & Watertown, New York—Local No. 693

Western New York Agreement

Article IV. 20. "The Union reserves the right to stop any of its members at any time or under any circumstances from making any pickups, drops or deliveries at any place where labor trouble exists, and further reserves the right to allow any of its members to handle any merchandise involved in a labor dispute and under no circumstances will such merchandise be allowed to be taken from the terminal by any person for forwarding to its destination."

Charlotte, N. C.—2176, 3050, 1102—12-4-45 to 8-31-46 —Local No. 71

Now covered by Carolina Agreement

Section 7. (G): "The members of the Union shall have the right at all times to refuse to make pick-ups or deliveries at points where there is a strike authorized by this Local Union, the Joint Council of the District where one exists, or by the International Brotherhood. It shall not be considered a violation of this agreement for members of the Union to engage in sympathetic activities for and on behalf of Sister Local Unions."

SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
JUL 30 1957
JOHN T. FEY, Clerk

No. 324

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

LOCAL 850, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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CITATIONS

CASES:

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National Labor Relations Act, as amended, (61 Stat. 147, 29 U.S.C. Section 160(e)) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No.

LOCAL 850, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit, issued May 9, 1957, affirming the National Labor Relations Board order against Petitioner.

OPINIONS BELOW

The National Labor Relations Board's opinion is reported in the Official Reports of that agency and appears at 115 NLRB 800. (Appendix A, *infra.*) The opinion of the United States Court of Appeals for the District of Columbia is not yet reported. (Appendix B, *infra.*) This case is a companion case to that of *National Labor Relations Board* v. *General Drivers, Chauffeurs, Warehousemen and Helpers, Local No. 886, AFL-CIO,* in which the Solicitor General filed a Petition on behalf of the National Labor Relations Board with this Court. (No. 273).

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. Section 1254 and under Section 10(e) of the National Labor Relations Act, as amended, 61 Stat. 147, 29 U.S.C. Section 160(e). (Appendix C, *infra.*) The judgment of the court below was entered on May 9, 1957, and its decree issued on June 7, 1957. (Appendix B, *infra.*)

QUESTIONS PRESENTED

(1) Where employees engaged in a lawful economic strike picket vehicles belonging to their employer while at the premises of common carriers who have a collective bargaining agreement with a Union which contains a "hot cargo" clause, is such picketing in violation of 8(b)(4)(A) of the National Labor Relations Act?

(2) Was the controversy rendered moot by a complete settlement of the dispute prior to the issuance of the complaint by the General Counsel of the National Labor Relations Board?

STATUTES INVOLVED

The statutory provision involved is Section 8(b)(4)(A) of the National Labor Relations Act, as amended. (61 Stat. 136, 29 U.S.C. 151 *et seq.*) (Appendix C, *infra.*)

STATEMENT

A. Facts

On September 15, 1954, the Petitioner, the bargaining representative of the production and maintenance employees of the American Iron and Machine Works Company, called a lawful strike to enforce its economic demands (R. 31).[1] During the strike it became necessary for the employer to deliver its freight to the common carriers' docks by means of its own vehicles (R. 32). The Petitioner's pickets followed the Company's vehicles which, except on one occasion, bore the identification markings of American Iron (R. 32) when deliveries were made to the docks of the common carriers[2] and picketed these vehicles in a "U" shaped path while they remained at those premises (R. 104). When the Company's vehicles left the premises of the common carriers the pickets also left.

General Drivers, Chauffeurs, Warehousemen and Helpers Union Local 886, AFL-CIO, hereinafter called the Teamsters, was the collective bargaining representative of the employees of the common carriers. Its contract with each of the carriers contained the following clause (R. 41-42; 140, 187):

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[1] "R" references are to the Joint Appendix filed in the court below.

[2] Santa Fe Trail Transportation Co.; Gillette Motor Transport, Time, Inc.; D. C. Hall Transportation Co.; and Lee Way Motor Freight Lines.

"

ARTICLE 4

* * * * *

(b) Members of the union shall not be allowed to handle or to haul freight to or from an unfair company, provided this is not in violation of the Labor-Management Relations Act of 1947."

Because of this clause, the Teamsters on occasions when American Iron trucks appeared at the loading platform to unload American Iron products for shipment, induced, instructed or encouraged, but did not coerce, its members employed by the carriers on the loading platforms to comply with that clause in the contract by refraining from unloading the trucks.

On September 24, 1954, American Iron filed with the Regional Director for the Sixteenth Region of the National Labor Relations Board separate unfair labor practice charges alleging that the Petitioner and the Teamsters had violated Section 8(b)(4)(A) of the National Labor Relations Act. Prior to the issuance of the complaint in those cases, the Regional Director petitioned the United States District Court for the Western District of Oklahoma for a temporary injunction enjoining both Unions from engaging in certain acts alleged to be violations of the National Labor Relations Act (Civil Case No. 6428, unreported). On October 16, 1954, after a hearing before that Court, the petition was dismissed on the grounds that the "hot cargo" clause in the Teamsters' agreement was a valid defense to the alleged violation of Section 8(b)(4)(A) of the Act by either union. Thereafter, on October 21, 1954, American Iron and the Petitioner signed a collective bargaining agreement (R. 31) thereby settling the dispute and as of that date all picketing ceased. Two days later, on October

23, 1954, the General Counsel of the National Labor Relations Board, issued complaints based on the charges filed by American Iron (R. 2-8, 11-15).

B. The Board's Conclusions and Order

The National Labor Relations Board, with two members dissenting, found that the Petitioner had violated Section 8(b)(4)(A) of the Act by picketing the vehicles of American Iron at the docks of the common carriers and by oral appeals to the employees of the common carriers to cease handling the goods of American Iron. The majority of the Board, with two members dissenting, also concluded that the Teamsters' appeals to the carriers' employees not to handle American Iron freight were violations of Section 8(b)(4)(A) of the Act, notwithstanding the "hot cargo" clause in the Teamsters' contracts with the carriers. However, four members of the Board agreed that this clause was not contrary to public policy. The two dissenting members found that neither Union had violated Section 8(b)(4)(A) of the Act because, in their view, as four of the Board's members were in agreement that the "hot cargo" clause was valid and proper under the Act, the clause necessarily constituted a defense to an appeal to the carriers' employees not to handle goods subject to the clause. They reasoned that the carriers had consented in advance to such refusal and, in any event, the handling of "struck goods" was not a part of the required duties of the employees and, accordingly, to handle these goods was not in the course of their employment.

The Petitioner moved for a reconsideration of the Board's Decision and Order on the ground that the Board did not pass or consider the Petitioner's con-

tention that the controversy was moot at a time prior to the issuance of the original complaint in this matter (R. 86-87). The Board denied Petitioner's motion (R. 86-87).

Subsequently, the Board entered an order requiring the Petitioner and the Teamsters to cease and desist from the unfair labor practices and to post appropriate notices (R. 65-67), and from that order the Petitioner appealed.

C. The Decision of the Court Below

The Court below (with one Judge dissenting on each part of the case) set aside the Board order against the Teamsters and enforced the Board's order against the Petitioner. (Appendix B, *infra.*) The Court held that the "hot cargo" clause was not violative of Section 8(b)(4)(A) and that this clause removed one of the elements essential to the finding of a violation of this Section; namely, that there could be no forcing or requiring of an employer to cease doing business with another person because the employer was only being compelled to live up to its own voluntary contract entered into in advance of the occurrence. Therefore, the Court concluded that the Teamsters' enforcement of its "hot cargo" agreements was not in violation of Section 8(b)(4)(A). However, the Court concluded that the Petitioner's conduct did violate Section 8(b)(4)(A) of the Act, and that the "hot cargo" clauses were not a defense to the Petitioner's action. The majority of the Court summarily found that the Petitioner's defenses of mootness and primary picketing activity were without merit. The dissenting Judge found that the Petitioner's activity did not violate

Section 8(b)(4)(A) of the Act because the "hot cargo" clause was a defense available to the Petitioner.

REASONS FOR GRANTING THE WRIT

1. The case at bar involves the same facts, and is dependent upon the correctness of the holding of the court below in *National Labor Relations Board* v. *General Drivers, Chauffeurs, Warehousemen and Helpers Union, Local No. 886, AFL-CIO*, (Case No. 273, in the Supreme Court of the United States), in which case the Solicitor General, on behalf of the Board, filed with this Honorable Court (on July 12, 1957) a Petition for a Writ of Certiorari.[3] Because that case and this one are so closely intertwined and interrelated, they should be considered together. As pointed out by the Solicitor General in his petition in Case No. 273, the decision by the Court of Appeals applies equally to the Teamsters *and the Petitioner*. These cases were originally consolidated by the General Counsel and the Board at the time the consolidated complaint issued and were heard as a single case before the Board and the Court below. A similar procedure was followed in the proceedings conducted before the United States District Court for the Western District of Oklahoma in regards the same subject matter (*Elliott* v. *General Drivers, Chauffeurs, Warehousemen and Helpers Union, Local No. 886, AFL-CIO, and Local 850, International Association of*

[3] A Petition for a Writ of Certiorari has also been filed in *Local 1976, United Brotherhood of Carpenters and Joiners of America, A.F.L.; Los Angeles County District Council of Carpenters; Nathan Fleisher* v. *National Labor Relations Board*, 241 F. 2d 147 (C.A. 9) (Case No. 127) which case also involves a "hot cargo" clause. The National Labor Relations Board by Memorandum dated July 1, 1957 did not oppose the granting of this petition.

Machinists, AFL-CIO, Civil Case No. 6428). The Petitioner has consistently maintained before all the reviewing authorities below that the "hot cargo" clause of the Teamsters' agreement with the common carriers prevented the Petitioner's notice to the Teamsters Union and its members that "hot cargo" was present at the carriers' docks from forming the basis for a charge of violation of Section 8(b)(4)(A) of the Act. District Judge Wallace agreed, as did Circuit Judge Washington.

Inasmuch as this case and Case No. 273 involve the same question of the validity of the Teamsters "hot cargo" clause, it is desirable that this Court review and dispose of this case along with Case No. 273.

2. This case concerns important legal questions involving the construction and application of an important section of the National Labor Relations Act (8(b)(4)(A)). There has been a conflict in the interpretation of this section between various federal courts and the Board. For example, the holding of the court below was that the "hot cargo" clause was valid and enforceable by the Teamsters, yet it was not available as a defense to the alleged unfair labor practice of the Petitioner because Petitioner was neither a contracting party nor a third party beneficiary to the Teamster agreement containing the "hot cargo" clause. The dissenting Judge in the case at bar, however, held that the Petitioner had not violated Section 8(b)(4)(A) for the reason that what was being induced was not a "strike or refusal to work" with an object of "forcing" or "requiring" an employer to cease doing business with another person within the meaning of Section 8(b)(4)(A) and that the operative effect of the employer's consent was the same, regardless of

who it was that reminded the secondary employees of the terms of their contract and sought to induce compliance with it. The same conclusion was reached by Judge Wallace in the United States District Court for the Western District of Oklahoma (Civil Case No. 6428) when the Board's Regional Director applied for a temporary injunction on October 16, 1954; also *Madden* v. *Local 442, International Brotherhood of Teamsters*, 114 F. Supp. 932 (D. C. Wisc.). The latter two cases involved proceedings under Section 10(1) of the National Labor Relations Act. See also *Rabouin, d/b/a Conway's Express* v. *National Labor Relations Board*, 195 F. 2d 906 (C.A. 2) and *Milk Drivers and Dairy Employees Local Union No. 338* v. *National Labor Relations Board*, decided June 19, 1957 (unofficially reported at 40 LRRM 2279).

In order to resolve the conflict between the Board and the various courts which have considered this problem, it would appear appropriate for this Court to grant a review of the case at bar.

3. As a matter of law, the decision of the court below is in error. The decision below rests on the premise that the Petitioner was neither a contracting party nor a third party beneficiary to the collective bargaining agreement containing the "hot cargo" clause. Assuming *arguendo* that this holding is correct, the court below in the *Teamster* case found that the essential elements necessary to a finding of a violation of Section 8(b)(4)(A) were not present; i.e., there was no strike or refusal to work; and there was no forcing or requiring an employer to cease doing business with another person, because the employer was only compelled to live up to his own voluntary contract entered

into in advance of the happening. See, *Milk Drivers and Dairy Employees Local Union No. 338* v. *National Labor Relations Board*, decided June 19, 1957, 40 LRRM 2279, *Rabouin, a/b/a Conway's Express* v. *National Relations Board*, 195 F. 2d 906 (C. A. 2) and the dissenting opinion of Judge Washington in the case at bar. Accordingly, if the presence of a "hot cargo" clause removes the elements necessary to the finding of a violation of Section 8(b)(4)(A) as to the Teamsters, we submit that the Court erred in not finding that the Petitioner was likewise insulated from a finding of a violation of 8(b)(4)(A) of the Act.

4. The Court erred in not finding the case was rendered moot. The underlying dispute between the parties was completely resolved two days prior to the issuance of the Board's complaint and five days after a petition for a temporary injunction had been denied. *Local 74, United Brotherhood of Carpenters and Joiners, AFL, et al* v. *National Labor Relations Board*, 341 U.S. 707; *United States* v. *W. T. Grant Company et al*, 345 U.S. 629; *Milgram et al* v. *Lowe's, Inc., et al*, 192 F. 2d 579.

5. The Court also erred in not finding that the Petitioner's picketing was primary under the standards established in *Matter of Sailor's Union of the Pacific, AFL*, 92 NLRB 547; *Sales Drivers et al* v. *National Labor Relations Board*, 229 F. 2d 514, and in not finding that the appeals to the employees of the secondary employers were not in violation of Section 8(b)(4)(A) of the Act, since they were not "inducements" or "encouragements" within the meaning of that Section. *National Labor Relations Board* v. *Rice Milling Company, Inc; et al.* 341 U.S. 665.

CONCLUSION

For the reasons stated, this Petition for Certiorari should be granted.

Respectfully submitted.

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July, 1957

APPENDIX

APPENDIX "A"

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 16-CC-47
Case No. 16-CC-48

Decision and Order[1]

On March 18, 1955 Trial Examiner Sidney L. Feiler issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices alleged in the complaint and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner also found that Respondents had not engaged in certain other alleged unfair labor practices and recommended that the complaint be dismissed as to them. Thereafter, the Respondents filed exceptions to the Intermediate Report with supporting briefs.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, insofar as they are consistent with this Decision and Order.

1. We find, as did the Trial Examiner, that Respondent Teamsters by its inducement of employees of the common carriers (secondary employers) to engage in a concerted refusal in the course of their employment to handle freight brought by American Iron (the primary employer) to the carriers' docks, with an object of forcing or requiring the

[1] The AFL and CIO having merged subsequent to the hearing in this proceeding, we are amending the identification of the affiliation of the unions accordingly.

carriers to cease doing business with American Iron violated Section 8 (b) (4) (A) of the Act.

Like the Trial Examiner, we reject the contention of Teamsters that its conduct was excused by the "hot cargo" clause in the Teamsters' contracts with the common carriers. This clause provided that members of Teamsters "shall not be allowed to handle or haul freight to or from an unfair company." However, in rejecting this defense, we do not rely, as did the Trial Examiner, on the McAllister case,[2] but rather on more recent Board decision in the Sand Door case,[3] which was decided after the issuance of the Intermediate Report in the case at bar. As stated in the principal opinion in that case, regardless of the existence of a "hot cargo" clause, any direct appeal to employees by a union to engage in a strike or concerted refusal to handle a product is proscribed by the Act when one of the objectives set forth in Section 8 (b) (4) (A) is present. Thus, while Section 8 (b) (4) (A) does not forbid the execution of a hot cargo clause or a union's enforcement thereof by appeals to the employer to honor his contract, the Act does, in our opinion, preclude enforcement of such clause by appeals to employees, and this is so whether or not the employer acquiesces in the union's demand that the employees refuse to handle "hot" goods. Accordingly, in affirming the Trial Examiner, we do not find it necessary to rely as he did, on the fact that the secondary employers herein did not acquiesce in the refusal of their employees to handle American Iron's freight. In our view, it is sufficient that there was direct inducement of such employees by Teamsters not to handle such freight, with an object of forcing the secondary employers to cease dealing with American Iron.

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[2] McAllister Transfer, Inc., 110 NLRB 1769.

[3] Sand Door and Plywood Co., 113 NLRB No. 123. Members Murdock and Peterson dissented.

2. Like the Trial Examiner, we find also that Respondent-Machinists violated Section 8 (b) (4) (A) of the Act (a) by picketing American Iron trucks at the docks of the neutral common carriers while the trucks were attempting to deliver American Iron freight to the carriers,[4] and (b) the oral appeals of Machinists' agents to the employees of the carriers not to handle American Iron freight at the carrier's docks; all with the object of forcing the carriers to cease dealing with American Iron.[5]

ORDER

Upon the entire record in this case and pursuant to Section 10 (c) of the National Labor Relations Board, as amended, the National Labor Relations Board hereby orders that the Respondents, General Drivers, Chauffeurs, Warehousemen and Helpers Union, Local No. 886, AFL-CIO and Local 850, International Association of Machinists, AFL-CIO, and their officers, representatives, agents, successors and assigns, shall:

1. Cease and desist from inducing or encouraging the employees of Gillette Motor Transport, Inc., D. C. Hall Transport, Inc., Santa Fe Trails Transportation Company, Time, Inc. and Lee Way Motor Freight Lines, or any other employer, to engage in a strike or concerted refusal in the course of their employment to work on or handle freight consigned to or received from American Iron and Machine Works Company, or any other employer, where an object thereof is to force or to require any employer or

[4] We find that this picketing was unlawful, not only because of the availability of the primary employer's premises for that purpose, but also because the pickets failed to disclose that their dispute was only with the primary employer. See Moore Dry Dock Company, 92 NLRB 547.

[5] As we have found that the hot cargo clause in the Teamsters' contracts with the carriers is not available as a defense to the Teamsters, it necessarily follows that such clause is likewise not available to the Machinists.

person to cease doing business with American Iron and Machine Works Company.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Post at their respective business offices in Oklahoma City, Oklahoma, copies of the notice attached to the Intermediate Report as Appendix A.[6] Copies of said notice, to be furnished by the Regional Director for the Sixteenth Region, after being duly signed by official representative of the Respondents, shall be posted by the Respondents immediately upon receipt thereof, and maintained by them for a period of sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to members of the Respondents are customarily posted. Reasonable steps shall be taken by the Respondents to insure that said notices are not altered, defaced, or covered by any other material. The Respondents shall also sign copies of the notice, which the Regional Director shall submit for posting at the Oklahoma City premises of Gillette Motor Transport, Inc., D. C. Hall Transport, Inc., Santa Fe Trails Transportation Company, and Time, Inc. said employers being willing. The Respondent Machinists shall also sign a copy of the notice for posting at Lee Way Motor Freight Lines.

(b) Notify the Regional Director for the Sixteenth Region in writing within ten (10) days from the date of this Order what steps the Respondents have taken to comply herewith.

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[6] This notice shall be amended by substituting for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER," in the caption thereof, the words "A DECISION AND ORDER." In the event that this Order is enforced by decree of a United States Court of Appeals, there shall be substituted for the words "PURSUANT TO A DECISION AND ORDER" the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER."

It is further Ordered that the complaint be dismissed insofar as it alleges that the Respondent Teamsters violated Section 8 (b) (4) (A) of the Act by activities at Lee Way Motor Freight Lines, and that the Respondents violated Section 8 (b) (1) (A) of the Act.

Dated, at Washington, D. C. March 15, 1956.

BOYD LEEDOM
Boyd Leedom, *Chairman*
PHILIP RAY RODGERS
Philip Ray Rodgers, *Member*
STEPHEN S. BEAN
Stephen S. Bean, *Member*

(SEAL) NATIONAL LABOR RELATIONS BOARD

PHILIP RAY RODGERS, MEMBER, concurring:

I concur in the result reached by Chairman Leedom and Member Bean only because I am convinced that "hot cargo" clauses are contrary to public policy and cannot, therefore, serve as a defense to a complaint charging a violation of Section 8 (b) (4) (A) of the Act. I have stated before, and now reiterate, that Section 8 (b) (4) (A) was specifically intended by Congress to safeguard the public interest, i.e., "in order adequately to protect the public welfare which is inextricably involved in labor disputes." A "hot cargo" provision, as I see it, is a device to immunize in advance the very conduct which Congress, in response to a dire public need, sought effectively to eliminate. I therefore feel that we cannot, in the light of our mandate from Congress, permit this device to preclude what would otherwise require the finding of an unfair labor practice under the statute.

Dated, Washington, D. C. March 15, 1956.

PHILIP RAY RODGERS
Philip Ray Rodgers, *Member*
NATIONAL LABOR RELATIONS BOARD

ABE MURDOCK and IVAR H. PETERSON, MEMBERS, *dissenting*:

In this case a majority of the present Board completes a reversal of a principle of Board law[7] that has been affirmed in each United States circuit[8] and district court[9] in which the issue has been raised. Indeed, as the Trial Examiner found, the General Counsel's request for a preliminary injunction pending the Board's decision in this very case was refused by the United States District Court for the Western District of Oklahoma on the ground that the neutral employers involved had granted their employees permission by contract to refuse to handle freight from the American Iron and Machine Works Company, an employer engaged in a labor dispute with the Respondent Machinists. The majority, however, ignoring and disregarding the decision of these courts, finds that the Respondents Teamsters and Machinists have violated Section 8 (b) (4) (A) despite the fact that the conduct of these Unions did not extend beyond inducement of employees not to handle freight from an unfair company, work which their employers and the Teamsters had agreed by a lawful[10] contract that employees would not be "allowed" to perform. We do not believe that the logic and force of considered judicial decisions which reaffirm the correctness of the Board's initial interpretation of the Act in Conway's Express should be so cavalierly ignored.

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[7] Conway's Express, 87 NLRB 972; Pittsburgh Plate Glass Company, 105 NLRB 740.

[8] Rabouin d/b/a Conway's Express, 195 F. 2d 906 (C.A. 2).

[9] Madden v. Local 442, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, 114 F. Supp. 932 (D.C. Wisc.); N.L.R.B. v. Lodge 850, AFL's Machinists and Local 886, AFL's Teamsters, U.S. D.C. E.D. Okla., October 16, 1954.

[10] The majority decision finds that "Section 8 (b) (4) (A) does not forbid the execution of a hot cargo clause."

"The McAllister case[11] was the first to intrude upon the theretofore well-established Conway's Express doctrine. In the latter case the Board, affirmed by the Court of Appeals for the Second Circuit, held that an employer could lawfully agree in advance that its employees would not be required to handle freight from any employer involved in a labor dispute and that the invocation of such a contractual clause by a Union was not proscribed by Section 8 (b) (4) (A). The Board said:

It is evident from these facts that the three secondary employers, in effect, consented in advance to boycott Conway's. As they consented, their employees' failure to deliver freight to or accept freight from Conway trucks was not in the literal sense a "strike" or "refusal" to work, nor was any such concerted insubordination contemplated by the Respondent when it caused the employees to exercise their contractual privilege.

Expressly upholding the validity of the union's conduct in that case, the Court of Appeals held:

The union cannot have committed an unfair labor practice under this section in regard to those employers who refused to handle Rabouin's shipments under the terms of the area agreement provision relating to cargo shipped by struck employers. Consent in advance to honor a hot cargo clause is not the product of the union's "forcing or requiring any employer . . . to cease doing business with any other person."

In McAllister, Chairman Farmer, whose vote was necessary to the majority decision, stated that he was "loathe to disturb" the Company's principle since it had court approval. However, he distinguished the two cases on the ground that in McAllister, unlike Conway's, the secondary employers had posted notices specifically directing their employees to handle hot cargo notwithstanding their

[11] McAllister Transfer, Inc., 110 NLRB 1769.

contractual agreement to the contrary. This distinction, the validity of which we questioned in our dissenting opinion in McAllister, was apparently abandoned by the Board majority in the Sand Door and Plywood case[12] where Chairman Farmer and Member Leedom held, on the one hand, that employers could "agree in advance" to boycott another employer by executing a hot cargo clause but, on the other hand, that such an agreement was not defense to an appeal by the union to employees not to handle goods subject to the agreement. We can only read this decision as meaning that an agreement is not an agreement whenever the actual facts contemplated by the agreement arise. If this logic prevails in the field of labor relations, then parties to collective bargaining agreements can never provide for the peaceful settlement of future disputes nor can either rely upon the solemnly pledged word of the other in a lawful existing contract.

The rationale of the Sand Door and Plywood case is, according to the majority, the sole basis for its decision in the instant case. The majority finds that Section 8 (b) (4) (A) "does not forbid the execution of a hot cargo clause or a union's enforcement thereof by appeals to the employer to honor his contract." Notwithstanding this finding, the majority then concludes that a union may not seek enforcement of the clause by appeals to employees "whether or not the employer acquiesces in the union's demand that the employees refuse to handle the "hot goods." The inconsistency of these findings is so apparent that they must, in our opinion, fall of their own weight. What good is a contract that deprives one of the parties of a benefit derived through collective bargaining unless the other party unilaterally decides to "honor his contract" rather than to breach it? Indeed, the language of this decision is so broad that even if an employer reaffirms his adherence to an existing contract the union

[12] Sand Door and Plywood Co., 113 NLRB No. 123.

may not, under penalty of violating Section 8 (b) (4) (A), notify its members that the contract applies. From the majority's decision it would seem that officials of the Teamsters may not so much as discuss a hot cargo clause at a membership meeting for this may be construed by the majority as an inducement of employees to engage in a strike for an object proscribed by Section 8 (b) (4) (A). Carried further, the majority's decision may also be taken to mean that the union cannot send copies of a contract, containing a hot cargo clause, to its members on whose behalf the contract was signed for this conduct may similarly be construed as an inducement of employees to read and therefore rely upon their contractual rights. Such a result, in our opinion, reduces the majority's position to an absurdity.

For these reasons and for the reasons expressed in our dissenting opinions in McAllister and Sand Door and Plywood so far as they are applicable here, we would dismiss this complaint in its entirety both with regard to the Teamsters and the Machinists. Although the latter union was not a party to the contract, this circumstance is irrelevant in determining whether employees have been induced by the Machinists to engage in a strike or concerted to work within the meaning of Section 8 (b) (4) (A). If the failure of employees to handle hot goods is not considered a strike or concerted refusal in the course of their employment to handle the goods of another employer because it is excluded from the scope of their employment by contract, it would seem to follow that the inducement of them not to handle such goods, whether or not such inducement is by the union which is a party to the "hot cargo" agreement, is not violative of Section 8 (b) (4) (A). In other words, as the parties to the contract have by contract excluded the handling of "hot goods" from the required duties of the employees covered by the contract, the inducement of the employees by a union not a party to the contract not to do something that they are not re-

quired to do and which indeed is outside the scope of their employment would appear to be no more a violation of the Act than would such inducement by their own union. As a matter of fact in this case it seems clear that the parties to the contract intended to exclude the handling of hot cargo from the employees' scope of employment for the "hot cargo" clause provides that,

> Members of the Union shall not be *allowed* to handle or haul freight to or from an unfair company, . . . (Emphasis supplied.)

This language may be construed as constituting the refusal to handle hot cargo as of a duty than a privilege. That is, it expressly prohibits such activity and therefore may be considered as imposing a duty upon the employees not to handle hot cargo. How can it be held that another union that requested the employees covered by such a contract not to do that which they are prohibited by contract from doing, thereby has violated the law?

Dated, Washington, D. C., March 15, 1956.

ABE MURDOCK, *Member*
IVAR H. PETERSON, *Member*
NATIONAL LABOR RELATIONS BOARD

APPENDIX "B"

1. *Opinion of Court of Appeals*

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13394

GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 886, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

No. 13406

LOCAL 850, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

ON PETITIONS TO REVIEW AND SET ASIDE, AND ON REQUEST FOR ENFORCEMENT OF, AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Decided May 9, 1957

Before PRETTYMAN, WASHINGTON and BASTIAN, Circuit *Judges*

BASTIAN, Circuit Judge: These cases involve the issue as to whether or not the so-called "hot cargo" clause[1]

[1] The "hot cargo" clause in question reads: "(a) The Union and the Employer agree that it shall not constitute a breach of this Agreement for any employee or Union member covered herein to refuse to cross a picket line or to refuse to enter upon the premises of an Employer if such refusal does not constitute a violation of the Labor Management Relations Act of 1947. (b) Members of the Union shall not be allowed to handle or haul freight to or from an unfair company, provided, this is not a violation of the Labor Management Relations Act of 1947."

in a labor contract, wherein an employer agrees that his employees shall not be required to handle struck goods, is enforceable by the union party thereto, and whether it (the hot cargo clause) may be used as an excuse by a union on strike to conduct secondary picketing.

The facts found by the Trial Examiner and the majority of the National Labor Relations Board are substantially as follows:

Local 850, International Association of Machinists (hereinafter called Machinists) became involved in an economic strike with the American Iron & Machine Works Company (hereinafter called American Iron) in September 1954. The strike lasted a little over a month, terminating upon the execution of a new collective bargaining agreement. During the course of the strike the Machinists picketed the three plants of their employer. They also picketed trucks of American Iron when they appeared at the loading platforms of certain carriers. Representatives of General Drivers, Chauffeurs, Warehousemen and Helpers Union, Local 886 (hereinafter called Teamsters) instructed the unloading personnel of the carriers that, under the terms of the hot cargo clause of the contract between Teamsters and the carriers, the employees were not to handle American Iron goods since they were struck goods. Certain of the carriers, despite the hot cargo clause, requested their employees to handle American Iron goods, whereupon Teamsters urged its members employed by those carriers to refuse to handle these goods. One carrier-employer took no action and did not request his employees to unload.

On charges filed by American Iron, the National Labor Relations Board (hereinafter called the Board) issued complaints, filed two days after the new contract between American Iron and Teamsters was signed, against both Teamsters and Machinists by reason of the alleged violation of Section 8 (b) (4) (A) of the National Labor Rela-

tions Act, as amended.[2] A temporary injunction applied for by the Board was denied by the United States District Court for the Western District of Oklahoma.

The complaints of the Board were referred to a Trial Examiner and, after a preliminary report and consideration of the exceptions thereto, the Board, by a majority vote, two of the five members dissenting, directed that Machinists and Teamsters cease and desist from inducing or encouraging the employees of the carriers, or any other employer, to engage in a strike or concerted refusal in the course of their employment to work on or handle freight consigned to or received from American Iron, or any other employer, where an object thereof was to force or require any employer or person to cease doing business with American Iron. Two of the three members of the majority of the Board were of opinion that the hot cargo clause was valid; the third member, concurring in the result of the Board's order, was of opinion that the clause was illegal and did violence to Section 8 (b) (4) (A). The Board members comprising the majority held in effect that, even assuming that the Act itself does not prohibit the execution of a "hot cargo" clause, nevertheless, the Act does preclude enforcement of such a clause by appeals to employees.[3]

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[2] 61 Stat. 141 (1947): "(b) It shall be an unfair labor practice for a labor organization or its agents * * * (4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * *."

[3] The exact language of the Board's ruling is as follows: "* * * any direct appeal to employees by a union to engage in a

From the order of the Board, Teamsters and Machinists filed these petitions asking this court to review and set aside the order; and, in its answer to the petitions, the Board requested that its order be enforced.

I

Appeal in No. 13,394

PETITION OF GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 886

We agree with the four members of the Board who held that the hot cargo clause of the contract was not violative of the provisions of Section 8 (b) (4) (A) of the Act. This seems also to have been held by the Second Circuit in the so-called Conway case.[4] The majority of

strike or concerted refusal to handle a product is proscribed by the Act when one of the objectives set forth in Section 8 (b) (4) (A) is present. Thus, while Section 8 (b) (4) (A) does not forbid the execution of a hot cargo clause or a union's enforcement thereof by appeals to the employer to honor his contract, the Act does, in our opinion, preclude enforcement of such clause by appeals to employees, and this is so whether or not the employer acquiesces in the union's demand that the employees refuse to handle 'hot' goods. Accordingly, in affirming the Trial Examiner, we do not find it necessary to rely as he did, on the fact that the secondary employers herein did not acquiesce in the refusal of their employees to handle American Iron's freight. In our view, it is sufficient that there was direct inducement of such employees by Teamsters not to handle such freight, with an object of forcing the secondary employers to cease dealing with American Iron."

[4] *Rabouin* v. *National Labor Relations Board*, 195 F. 2d 906, 912 (2d Cir. 1952). There the court said: "The union cannot have committed an unfair labor practice under this section in regard to those employers who refused to handle Rabouin's shipments under the terms of the area agreement provision relating to cargo shipped by struck employers. Consent in advance to honor a hot cargo clause is not the product of the union's 'forcing or requiring any employer * * * to cease doing business with any other person.' § 8 (b) (4) (A)." See also *Meier & Pohlmann Furniture Co.* v. *Gibbons*, 233 F. 2d 296 (8th Cir. 1956); 113 F. Supp. 409 (1953); *Madden* v. *Local 442, etc.*, 114 F. Supp. 932 (W. D. Wis. 1953).

the Board held, following *Sand Door & Plywood Co.*, 113 N. L. R. B. No. 123, that any direct appeal to employees by a union to engage in a strike or concerted refusal to handle a product is proscribed by the Act, when one of the objectives set forth in Section 8 (b) (4) (A) is present. See note 3, *supra*.

With this we disagree. If the hot cargo clause is not violative of Section 8 (b) (4) (A), and we think it is not, such a ruling would in practical effect render nugatory the clause itself and would leave the employees without adequate remedy. The Board urges that Section 8 (b) (4) (A) was enacted for the benefit of the public. We think that, although the public is involved, this section has for its purpose the protection of those persons who might be subjected to a secondary boycott, which is proscribed by the section.

We are not impressed with the argument that other adequate remedies are open to the employees of the union. Such remedies as are suggested by the Board seem to us to be totally inadequate and not such as are contemplated by the agreement by the employer in the hot cargo clause.

Here the Teamster's conduct only consisted of urging the employees of the carriers not to handle freight from a company which they considered unfair. This was exactly what the carriers had agreed their employees would not be required to do. If an employer may lawfully agree that its employees will not be required to handle freight from a struck company, and such a situation arises, it is hard to see how it can be said that, simply because the employees do what they have the right to do, there was a strike or refusal to work. Nor can it be said that there was a "forcing" or requiring of an employer to cease doing business with another person, because the employer was only being compelled to live up to its own voluntary contract entered into in advance of the happening.

It cannot be argued that the actions of Teamsters constituted a sympathy strike or an illegal boycott. The actions taken might have been so regarded had there been no hot cargo clause. In sympathy strikes or illegal boycotts the employers are innocent victims of disputes with which they are not concerned. But where such a clause exists a different situation arises. The secondary employer has consented, knowingly and in advance, to the refusal of its employees to handle goods of the original employer.

It seems to us that the purpose of Section 8 (b) (4) (A) is to prevent injury to secondary employers in the disputes of others in which the secondary employers are not involved, and to prevent the forcing of such employers to stop doing business with a third person. But, in cases like this one, the secondary employer has agreed, as part of its bargaining contract with its own union, not to handle goods of an unfair employer; and it would seem that Teamsters employed the only effective means in its power to enforce the agreement.

I am authorized to state that Circuit Judge Washington agrees with the foregoing treatment of No. 13394. He is filing an additional statement.

Circuit Judge Prettyman dissents for reasons which he will state separately.

The Board's order as to Teamsters will be set aside.

II

Appeal in No. 13406

Petition of Local 850, International Association of Machinists

Machinists urge a number of objections to the Board's findings and order. Among them is that the Board erred in not holding that Teamster's conduct was protected activity and, accordingly, Machinists' conduct in bringing

the dispute to the knowledge of the members of the Teamsters' Union was not in violation of Section 8 (b) (4) (A).

Machinists were not parties to the contract between the carriers and Teamsters. But they contend that, since Teamsters and the carriers were parties to a contract containing the hot cargo clause, an essential element to a finding of violation of the Act is missing. Their position is that the handling of American Iron freight (struck goods) by the employees of the carriers was taken out of the scope of their employment by the hot cargo clause and, therefore, Machinists could induce carrier employees to exercise their contract right not to handle struck goods. Machinists urge that, since Teamsters were free to honor Machinists' ambulatory picket line, their activity would not constitute encouragement or inducement of Teamsters to engage in a concerted refusal in the course of their employment to handle the goods of another employer.

We agree with the Trial Examiner and the Board majority that the conduct of Machinists must be evaluated independently of that of Teamsters and that the defenses available to Teamsters are not automatically available to Machinists. The latter are neither parties nor third party beneficiaries of the Teamsters-carrier contract.

The Trial Examiner and the Board majority found that after picketing of American Iron trucks began, while the trucks were on the premises of the carriers, dock employees of at least some of the carriers continued to handle American Iron products. Indeed, in some instances there were protests when supervisory employees attempted to move merchandise which would ordinarily be moved by the dock employees who were members of Teamsters. The Board found further that in most instances the dock employees continued to handle American Iron freight until instructed by representatives of their union not to do so.

Here, as above stated, Machinists had no connection with the contract containing the hot cargo clause and Team-

sters' contract could not constitute the basis for a defense by Machinists.

We have examined the other contentions of Machinists, among them that the Board erred in not finding that the controversy was moot because the complaint was filed after the strike between Machinists and American Iron had been settled by execution of a new contract. A reading of the Act would indicate that a complaint may be filed where the party charged "has engaged in or is engaging" in unfair labor practices. There can be no doubt that orders dealing with unfair labor practices have preventive as well as remedial effects.

Machinists also contend that their picketing at the carriers' premises was legitimate primary activity aimed only at American Iron employees. This contention is foreclosed by the fact that the findings of the Board were based upon disputed facts; and there is substantial evidence to sustain the findings of the Board.

Circuit Judge Prettyman concurs in the result in No. 13,406 but for different reasons, which reasons he will state in a separate opinion.

Circuit Judge Washington, dissents for reasons which he will state separately.

Order of Board in No. 13394 set aside.
Order of Board in No. 13406 affirmed.

PRETTYMAN, Circuit Judge, dissenting in part and concurring in part: I dissent from Judge Bastian's opinion and proposed judgment in No. 13394, relating to the Teamsters. In a nutshell my view is that the hot cargo clause cannot be enforced by a strike, because such a strike or refusal to work is flatly forbidden by Section 8 (b) (4) (A) of the Act.

A strike is a concerted refusal by employees to do work the employer wants done. This is the purport of the opin-

ions on the point.[5] A refusal to work is likewise a declination directed at the employer. So, if an employer and his employees agree that certain work shall not be done, and it is therefore not done, there is no "strike" or "refusal to work". Section 8 (b) (4) (A) forbids only "a strike or a concerted refusal in the course of their employment".

It follows from the foregoing that, if an employer and his employees agree by contract that the employees need not handle certain goods, and both abide by their agreement, there is no "strike or refusal to work." But, if an employer, having entered into such a contract, thereafter refuses to abide by his agreement and directs his employees to handle the goods, and his employees refuse to do so, there is a strike or refusal to work. Such a strike or refusal to work, where an object is to force the employer to cease transporting the products of another producer, is forbidden by the statute.

It may be that the right vouchsafed the employer by Section 8 (b) (4) (A) cannot be nullified by contract. Section 7 rights cannot be contracted away.[6] And it can be argued that when Congress meant Section 8 rights to be subject to contract it said so, as it did in Section 8 (a) (3). But I need not reach that question, and, since the answer, one way or the other, involves such sweeping considerations, I do not undertake it. On the other hand it may be that the hot cargo clause is a valid contract agreement between the carriers and their employees and may validly be carried out by both parties. But even so, when a carrier refuses to comply with the contract, even though he is thereby violating the agreement, the Team-

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[5] See Restatement, Torts, § 797 (1939), and the many cases collected under "Strike" in *Words and Phrases*, especially in the pocket supplement.

[6] *Nat. Licorice Co.* v. *Labor Board*, 309 U. S. 350, 84 L. Ed. 799, 60 S. Ct. 569 (1940). See also *Bethlehem Steel Company*, 89 N. L. R. B. 341 (1950).

sters, his employees, may not strike or refuse to work in order to prevent the handling of the struck goods. I think the employees may not violate the statute in order to enforce their agreement with the carrier.[7]

The sum of it is that Section 8 situations can legally be avoided, by contract or otherwise. Employers and employees need not so conduct themselves as to give rise to Section 8 prohibitions.[8] But the terms of the statute cannot be nullified, by contract or otherwise. And so employers and employees cannot agree that even if a situation covered by the statute does occur the statute shall not apply.

I do not agree with the argument that the hot cargo clause has the effect of removing struck goods from "the course of their [the Teamsters'] employment." If such a construction could be placed upon the phrase in Section 8 (b) (4) (A), careful contract draftsmanship could legalize without qualification any otherwise prohibited activity, *e. g.*, the jurisdictional strike, the sympathy strike, and the wildcat strike, by artificially exempting the work involved from the course of the employment governed by the contract. I think the statute cannot thus be nullified.[8] One of the carriers involved here adhered to its agree-

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[7] Strong evidence of the public interest in the problem is afforded by the fact that the motor carrier which honors a hot cargo clause thereby violates duties owed the public, breaches other contracts, and may well be in violation of another public law, Part II of the Interstate Commerce Act, 49 Stat. 543 (1935), as amended, 49 U. S. C. A. § 301 *et. seq.* See the *Examiner's Decision in Galveston Truck Line Corp.* v. *ADA Motor Lines*, I. C. C. No. MC-C-1922 (April 1957), which involves actions of our appellant Teamsters, Local No. 886, and cooperating motor carriers.

[8] The Board's rejection of this argument on another ground, *Sand Door & Plywood Co.*, 113 N. L. R. B. 1210, 1217 (1955), was cited with approval by the Sixth Circuit in *National Labor Relations Board* v. *Local 11, United Brotherhood of Carpenters, Etc., et al.*, — F. 2d — (1957).

ment and would not request its employees to handle the goods. Its employees did not strike. So in that particular case I would not affirm the cease and desist order. As to all the other carriers I would affirm as to the Teamsters.[9]

I concur in Judge Bastian's proposed judgment in No. 13406, relating to the Machinists. I also agree with his opinion in that regard, except that I add, since as I have pointed out I think the hot cargo clause could not be enforced by a strike, that it could not have been so enforced by the Machinists even if they had been parties to the contract.

WASHINGTON, *Circuit Judge*, concurring in Judge Bastian's opinion in No. 13394, and dissenting from the latter's opinion in No. 13406:

In the *General Drivers* case, I think Judge Bastian is correct in his treatment of the "hot cargo" clause and its effect. That clause is bargained for, and must be presumed to be balanced by concessions which the employer has obtained at the bargaining table. To say that the employer is free in his discretion to recognize or ignore the clause, when a concrete problem comes up, seems to me to encourage lawlessness in industrial relations. Once a valid contract has been made—and contracts such as this have been recognized as valid by the Board and the Second Circuit—both sides are entitled to rely on the prompt and faithful execution of its provisions. I therefore agree that efforts by the Teamsters to induce their own members to abide by the terms of the "hot cargo" clause embodied in their collective bargaining agreement are not violative of Section 8(b)(4)(A).

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[9] In *National Labor Relations Board* v. *Local 1976, United Brotherhood of Carpenters, Etc., et al.*, 241 F. 2d 147 (1957), the Ninth Circuit reached the result suggested in this dissent. See also *National Labor Relations Board* v. *Local 11, United Brotherhood of Carpenters, Etc., et al.*, —— F. 2d —— (6th Cir. 1957).

The same reasoning impels me to the conclusion (in No. 13406) that the efforts of the Machinists, directed toward the same end, are similarly outside the scope of the statutory proscription. It is true that the Machinists are not a party to the contract which contains the "hot cargo" clause, and not a third-party beneficiary of it. But this does not mean that the existence of the clause has no effect on the lawfulness of the Machinists' conduct. The clause is evidence of the advance consent of the trucking companies that their employees are to refrain from handling struck goods. Because the employers have given this consent and because no basis appears in the statute for permitting this consent to be revoked on an ad hoc basis, the efforts of the contracting union (the Teamsters) to induce employees of the trucking companies to comply with the clause are upheld. The reasoning must be that what is being induced is not a "strike or refusal to work" with an object of "forcing" or "requiring" an employer to cease doing business with another person within the meaning of Section 8 (b) (4) (A). This being so, I cannot agree that what is being induced *is* within the meaning of the statute when the inducing is done by the primary employees, the Machinists. The operative effect of the employer's consent is, in my view, the same, regardless of who it is that reminds the secondary employees of the terms of their contract, and seeks to induce compliance with it.

2. *Judgment Below*

United States Court of Appeals for the District of Columbia Circuit

April Term, 1957

No. 13394

GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 886, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

No. 13406

April Term, 1957

LOCAL 850, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petitions to Review and Set Aside, and on Request for Enforcement of, an Order of the National Labor Relations Board

Before: PRETTYMAN, WASHINGTON AND BASTIAN, *Circuit Judges*

Judgment

These cases came on to be heard on the record from the National Labor Relations Board, and were argued by counsel.

On consideration whereof, It is ordered and decreed by this Court that the order of the National Labor Relations Board on review in these cases be, and it is hereby, set aside so far as it applies to General Drivers, Chauffeurs, Warehousemen, and Helpers Union, Local No. 886, and that it be, and it is hereby, affirmed so

far as it applies to Local 850, International Association of Machinists.

Pursuant to Rule 38 (1) the respondent shall within 10 days hereof serve and file a proposed enforcement decree in case No. 13406.

Dated: May 9, 1957.

Per Circuit Judge BASTIAN.

Separate opinion by Circuit Judge Prettyman dissenting with respect to case No. 13394 and concurring as to case No. 13406.

Separate opinion by Circuit Judge Washington concurring as to case No. 13394 and dissenting as to case No. 13406.

3. *Decree Below*

United States Court of Appeals for the District of Columbia Circuit

No. 13394

GENERAL DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION, LOCAL NO. 886, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

No. 13406

LOCAL 850, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

DECREE ENFORCING IN PART AND DENYING IN PART AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: PRETTYMAN, WASHINGTON AND BASTIAN, *Circuit Judges*

This cause came on to heard upon the petitions of General Drivers, Chauffeurs, Warehousemen and Helpers Union, Local No. 886, AFL-CIO (hereinafter called Teamsters) and Local 850, International Association of Machinist, AFL-CIO (hereinafter called Machinists) to review and set aside an order of the National Labor Relations Board dated March 15, 1956. The Court heard argument of respective counsel on January 11, 1957, and has considered the briefs and the transcript of record filed in this cause. On May 9, 1957, the Court being fully advised in the premises handed down its decision granting enforcement of the Board's order as to the Machinists, but denying enforcement against the Teamsters. In conformity therewith, it is hereby

Ordered, adjudged and decreed by the Court that Local 850, International Association of Machinists, AFL-CIO, and its officers, representatives, agents, successors and assigns, shall:

1. Cease and desist from inducing or encouraging the employees of Gillette Motor Transport, Inc., D. C. Hall Transport, Inc., Santa Fe Trails Transportation Company, Time, Inc., and Lee Way Motor Freight Lines, or any other employer, to engage in a strike or concerted refusal in the course of their employment to work on or handle freight consigned to or received from American Iron and Machine Works Company, or any other employer, where an object thereof is to force or to require any employer or person to cease doing business with American Iron and Machine Works Company.

2. Take the following affirmative action, which the Board has found will effectuate the policies of the National Labor Relations Act, as amended (hereinafter called the Act):

(a) Post at its business offices in Oklahoma City, Oklahoma, copies of the notice attached hereto as Appendix A. Copies of said notice, to be furnished by the Regional Director for the Sixteenth Region of the National Labor Relations Board, Fort Worth, Texas, after being duly signed by an official representative of the Machinists, shall be posted by the Machinists immediately upon receipt thereof, and maintained by it for a period of sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to members of the Machinists are customarily posted. Reasonable steps shall be taken by the Machinists to insure that said notices are not altered, defaced or covered by any other material. The Machinists shall also sign copies of the notice, which the Regional Director shall submit for posting at the Oklahoma City premises of Gillette Motor Transport, Inc., D. C. Hall Transport, Inc., Santa Fe Trails Transportation Com-

pany, and Time, Inc., said employers being willing. The Machinists shall also sign a copy of the notice for posting at Lee Way Motor Freight Lines;

(b) Notify the aforesaid Regional Director in writing within ten (10) days from the date of this Decree what steps the Machinists have taken to comply herewith.

It is further hereby ordered, adjudged and decreed that those portions of the Board's order applicable to General Drivers, Chauffeurs, Warehousemen and Helpers Union, Local No. 886, AFL-CIO be and it hereby is set aside.

Dated: June 7, 1957.

(S) E. BARRETT PRETTYMAN,
Judge, United States Court of Appeals for the District of Columbia Circuit.

(S) GEORGE T. WASHINGTON,
Judge, United States Court of Appeals for the District of Columbia Circuit.

(S) WALTER M. BASTIAN,
Judge, United States Court of Appeals for the District of Columbia Circuit.

APPENDIX A

NOTICE TO ALL EMPLOYEES

Pursuant to a Decree of the United States Court of Appeals for the District of Columbia Circuit, enforcing an order of the National Labor Relations Board, and in order to effectuate the policies of the Labor Management Relations Act, we hereby give notice that:

We will not induce and encourage the employees of any employer other than American Iron and Machine Works Company to engage in a strike or concerted refusal in the course of their employment to perform services for their employer, where an object thereof

is to force or require any employer or person to cease doing business with American Iron and Machine Works Company.

LOCAL 850, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO.
(Labor Organization)

By .....
(Representative) (Title)

Dated .....

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX "C"

STATUTES INVOLVED

Judicial Code

28 USC 1et seq.

28 USC 1254. Court of Appeals; Certiorari; Appeal; Certified Questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . . Act of June 25, 1948, C. 646, 62 Stat. 928.

National Labor Relations Act

29 USC 158—UNFAIR LABOR PRACTICES.

(b) It shall be an unfair labor practice for a labor organization or its agents . . .

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a con-

certed refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; . . . ."

29 USC 160 (e)—Prevention of Unfair Labor Practices—Powers of Board Generally.

(e) Petition to court for enforcement of order; proceedings; review of judgment.

The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the United States court of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit of district, respectively, wherein the unfair labor practice in question occurred or wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing the court shall cause notice thereof to be served upon such person and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth

in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive . . . The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28. (Act June 7, 1934, c. 426, 48 Stat. 926; July 5, 1935, c. 372, § 10, 49 Stat. 453; June 25, 1936, c. 804, 49 Stat. 1921; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 146; June 25, 1948, c. 648, § 32, 62 Stat. 991).

No. 324

IN THE

Supreme Court of the United States

October Term, 1957

LOCAL 850, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

On Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

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BRIEF FOR THE PETITIONER

PLATO E. PAPPS
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Section 10(l) 12

IN THE

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No. 324

LOCAL 850, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

On Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court below (R. 195-204) is reported at 247 F. 2d 71. The National Labor Relations Board's opinion (R. 63-67, 26-61) is reported in the Official Reports of that agency and appears at 115 NLRB 800.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. Section 1254 and under Section 10(e) of the National Labor Relations Act, as amended, 61 Stat. 147, 29 U.S.C. Section 160(e). The Judgment of the court below (R. 205-206) was entered on May 9, 1957, and its decree (R. 206-208) issued on June 7, 1957. The writ of certiorari was granted on October 14, (R. 209).

STATUTE INVOLVED

The statutory provision involved is Section 8(b)(4)(A) of the National Labor Relations Act, as amended. (61 Stat. 136, 29 U.S.C. 151 *et seq.*), which states:

> Sec. 8 (b). It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * * * *
>
> (4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * *

QUESTIONS PRESENTED

1. Whether the settlement of underlying dispute, which gave rise to the alleged violation of Section 8

(b)(4)(A) of the Act, prior to the issuance of the complaint by the General Counsel of the Board rendered this case moot?

2. Whether the "hot cargo" clause in the Teamsters' contracts with the carriers eliminated the elements necessary for a finding of a violation of Section 8(b)(4)(A) by the Petitioner?

STATEMENT

A. Facts

On September 15, 1954, the Petitioner, the bargaining representative of the production and maintenance employees of the American Iron and Machine Works Company, called a lawful strike to enforce its economic demands (R. 31). During the strike it became necessary for the employer to deliver its freight to the common carriers' docks by means of its own vehicles (R. 32). The Petitioner's pickets followed the Company's vehicles which, except on one occasion, bore the identification markings of American Iron when deliveries were made to the docks of the common carriers.[1] Upon arrival at destination these vehicles were picketed in a "U" shaped path while they remained at those premises (R. 104). When the Company's vehicles left the premises of the common carriers, the pickets also left.

General Drivers, Chauffeurs, Warehousemen and Helpers Union, Local 886, AFL-CIO, (Respondent in Case No. 273) hereinafter called the Teamsters, was the collective bargaining representative of the

[1] Santa Fe Trail Transportation Co.; Gillette Motor Transport; Time, Inc.; D. C. Hall Transportation Co.; and Lee Way Motor Freight Lines.

employees of the common carriers. Its contract with each of the carriers contained the following "hot cargo" clause (R. 41-42; 140, 187):

ARTICLE 4

(b) Members of the union shall not be allowed to handle or to haul freight to or from an unfair company, provided this is not in violation of the Labor-Management Relations Act of 1947."

Because of this clause, on occasions when American Iron trucks appeared at the loading platform to unload American Iron products for shipment, the Teamsters induced its members employed by the carriers on the loading platforms to comply with that clause in the contract by refraining from unloading the trucks.

On September 24, 1954, American Iron filed with the Regional Director for the Sixteenth Region of the National Labor Relations Board separate unfair labor practice charges alleging that the Petitioner and the Teamsters had violated Section 8(b)(4)(A) of the National Labor Relations Act. Prior to the issuance of the complaint in those cases, the Regional Director petitioned the United States District Court for the Western District of Oklahoma for a temporary injunction enjoining both Unions from engaging in certain acts alleged to be violations of Section 8(b)(4)(A) of the National Labor Relations Act (Civil Case No. 6428, unreported). On October 16, 1954, after a hearing before that court, the petition for injunction was dismissed on the grounds that the "hot cargo" clause in the Teamsters' agreement was a valid defense to the alleged violation of Section 8(b)(4)(A) of the Act by either Union. Thereafter,

on October 21, 1954, American Iron and the Petitioner signed a collective bargaining agreement (R. 31) thereby settling the dispute and as of that date all picketing ceased. Two days later, on October 23, 1954, the General Counsel of the National Labor Relations Board issued complaints based upon the charges filed by American Iron (R. 2-8, 11-15).

B. The Board's Conclusions and Order

The National Labor Relations Board, with two members dissenting, found that the Petitioner had violated Section 8(b)(4)(A) of the Act by picketing the vehicles of American Iron at the docks of the common carriers and by oral appeals to the employees of the common carriers to cease handling the goods of American Iron, notwithstanding the "hot cargo" clause in the Teamsters' contracts with the carriers. However, four members of the Board agreed that this clause was not contrary to public policy. The two dissenting members found that neither union had violated Section 8(b)(4)(A) of the Act. The dissenters reasoned that the "hot cargo" clause, found by four members to be valid, excepted the handling of "hot cargo" from the scope of employment; that the carriers had consented in advance that its handling was not a part of the required duties of the employees; and, accordingly, the employer having agreed, inducement of the employees to conform with that agreement was not inducement of either a strike or of a concerted refusal to work in the course of their employment.

The Board also found that the controversy was not moot although the dispute had terminated in its entirety prior to the issuance of the original complaint in this matter (R. 86-87).

The Board entered an order requiring the Petitioner and the Teamsters to cease and desist from the unfair labor practices found and to post appropriate notices (R. 65-67), and from that order the Petitioner appealed.

C. The Decision of the Court Below

The court below (with one Judge dissenting on each part of the case) set aside the Board's order against the Teamsters and enforced the Board's order against the Petitioner (R. 195-204). The court unanimously held that the "hot cargo" clause was valid. A majority, Judge Prettyman dissenting, held that this clause removed elements essential to the finding of a violation of Section 8(b)(4)(A). They reasoned that there could be neither a strike or a refusal to work, nor a forcing or requiring of an employer to cease doing business with another person, because the employer was only being compelled to live up to its own voluntary contract entered into in advance of the occurrence. Therefore, they concluded, the Teamsters' enforcement of its "hot cargo" agreements was not in violation of Section 8(b)(4)(A). However, a different majority, Judge Washington dissenting, concluded that the Petitioner's conduct did violate Section 8(b)(4)(A) of the Act, upon the ground that the Petitioner could not rely upon the "hot cargo" clauses because it was not the contracting union. Judge Washington dissented from this view upon the ground that the "operative effect of the employer's consent is . . . the same regardless of who it is that reminds the secondary employees of the terms of their contract, and seeks to induce compliance with it"; for, whether the inducement is by the Teamsters or the Petitioner, "what is being induced is not a 'strike or refusal to work' with an object of 'forcing' or 'requiring' an employer to cease doing business with another person

within the meaning of Section 8(b)(4)(A)" (R. 204). The court also found that the Petitioner's defense of mootness was without merit.

SUMMARY OF ARGUMENT

I

The court below and the Board erred in not finding that the case was rendered moot by complete settlement of the underlying dispute which gave rise to the alleged unfair labor practices. This court has recognized that causes of action may become moot and in *Local 74, United Brotherhood of Carpenters and Joiners, AFL* v. *National Labor Relations Board*, 341 U.S. 707, 715, indicated that if the underlying dispute is settled, a cause alleging a violation of Section 8(b)(4)(A) will be considered by this court as moot. Therefore, since the underlying dispute was settled prior to the issuance of the complaint in this case the cause of action was rendered moot.

II

Assuming the legality of the "hot cargo" clause in the Teamster-common carrier agreements and the enforceability of that clause by direct inducement by the Teamsters of the common carriers employees, this defense is equally available to the Petitioner. The clause removes from the course of employment of the common carriers' employees the necessity of working on hot cargo, and it also negates the view that the object of the activity is forcing or requiring a cessation of business between the contracting employer and others, since the contracting employer had consented in advance to that cessation. Therefore, the necessary elements to a finding of a violation of Section 8(b)(4)(A) are missing.

ARGUMENT

I

THE CONTROVERSY WAS RENDERED MOOT BY A COMPLETE SETTLEMENT OF THE UNDERLYING DISPUTE PRIOR TO THE ISSUANCE OF THE COMPLAINT

The charges initiating the Board's proceedings in this case were filed on September 23 and 24, 1954 (R. 2, 11). Preliminary injunctive relief under Section 10(l) of the Act was denied by the District Court on October 16, 1954 (R. 68). Thereafter, on October 21, 1954, the Petitioner and American Iron signed a collective bargaining agreement for a period of two years (R. 188-190), thereby completely settling the underlying dispute. As of the date the agreement was signed, all picketing ceased (R. 31). The agreement contained a "no strike" clause (R. 188-189), which prohibited the Petitioner from participating in a strike or any concerted activity during the period of the agreement.

Despite the complete settlement of the underlying dispute, and though the possibility of a recurrence of the picketing was prohibited by the agreement, the General Counsel of the National Labor Relations Board nevertheless issued a complaint in these proceedings on October 23, 1954, two days after termination of the controversy (R. 11-15). The Board entertained the proceeding, stating only that the "voluntary cessation of unfair labor practices or private agreements for their end do not deprive the Board of its power to add the sanction of a Board Order and possibly enforcement proceedings in order to bar any recurrence of those practices" (R. 31).

The Board in its brief repeats the bromide, adding a few flourishes concerning the hypothetical "pos-

sibility" of recurrence of the conduct (p. 62). At no stage was there a genuine evaluation of the need for relief, the Board merely exercising the power because it may exist.

In the context of injunctive relief—which is what an administrative cease-and-desist order is—a case is moot in the absence of a "necessary determination that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." *United States v. W. T. Grant Co.*, 345 U.S. 629, 633. It is this distinction that the Board failed to apprehend or apply. It assumed that because there was no corpse to be buried that for that reason there was a patient to be ministered.

Thus, the complaint was issued two days after the termination of the dispute, and the order eighteen months later. There was no showing of any recurrence in the interim, nor is there any now although the matter is well over three years old. And there is no reasonable basis for a claim that this was not foreseeable from the outset. The order is confined to a cessation of "doing business with American Iron and Machine Works Company" (R. 65). But Petitioner's controversy with that Company was terminated two days before the complaint issued with a collective bargaining agreement containing a no-strike clause. So here the "underlying dispute . . . [had] been shown to have been resolved." *Local 74, United Brotherhood of Carpenters v. National Labor Relations Board*, 341 U.S. 707, 715. And no case cited by the Board deals, as here, with a situation where the underlying dispute has been resolved *before* the issuance of the administrative complaint. The Board rests

"merely upon a prophecy as to future conditions" (*United States* v. *Hamburg American Co.*, 239 U.S. 466, 475), a conjecture that Petitioner "will desire to renew [its] . . . claim to picket" in the speculative event of another strike at American Iron in the indeterminative future (*Benz* v. *Compania Naviera Hidalgo*, 205 F. 2d 944, 946 (C.A. 9), cert. denied, 346 U.S. 885). That is not enough.

II

IF THE "HOT CARGO" CLAUSE PRIVILEGED THE TEAMSTERS' INDUCEMENT OF THE CARRIER EMPLOYEES, IT ALSO IMMUNIZED THE MACHINISTS' INDUCEMENT OF THOSE EMPLOYESS

Assuming that the Teamsters' inducement of the motor carrier employees was not in violation of Section 8(b)(4)(A) because of the "hot cargo" clause in the carriers' contracts with the Teamsters,[2] it follows that the clause also privileges Petitioner's inducement of those employees. The carriers agreed that their employees would be prohibited from handling freight from a struck company. Therefore, when the employees refused to handle the freight of American Iron they were complying with the collective bargaining agreement and, as the court below correctly held, this was not a "strike" or "refusal" to work, and there was no "forcing" or "requiring" of an employer to cease doing business with another person. See also *Rabouin* v. *National Labor Relations Board*, 195 F. 2d 906, 912 (C.A. 2); *Milk Drivers and Dairy Employees Local Union No. 338* v. *National Labor Relations Board*, 245 F. 2d 817,

[2] The Petitioner in this case relies upon the arguments presented to the Court by the Respondent in Case No. 273 in respect to this point and therefore will not burden the court with additional argument.

822 (C.A. 2); *Douds* v. *Local 707, etc., International Brotherhood of Teamsters*, S.D.N.Y., September 24, 1957 (Herlands, J.), 33 Labor Cases Para. 70,984; and *Madden* v. *Teamsters*, 114 F. Supp. 932, 938 (W.D. Wis.).

The only question that remains is whether Petitioner may not rely upon the Teamsters' "hot cargo" clause because it is not the contracting union. A majority of the Board did not pass upon this question because they found that the "hot cargo" clause was not available to the Teamsters and therefore was not available to the Petitioner (R. 65). However, the dissenting opinion in regard to this subject stated (R. 71-72):

> ". . . we would dismiss this complaint in its entirety with regard to both the Teamsters and the Machinists. Although the latter union was not a party to the contract, this circumstance is irrelevant in determining whether employees have been induced by the Machinists to engage in a strike or concerted refusal to work within the meaning of Section 8(b)(4)(A). If the failure of employees to handle hot goods is not considered a strike or concerted refusal *in the course of their employment*, to handle the goods of another employer because it is excluded from the scope of their employment by contract, it would seem to follow that the inducement of them not to handle such goods, whether or not such inducement is by the union which is a party to the "hot cargo" agreement, is not violative of Section 8(b)(4)(A). In other words, as the parties to the contract have by contract excluded the handling of "hot goods" from the required duties of the employees covered by the contract the inducement of the employees by a union not a party to the contract not to do something that they are not required to do and which indeed is outside the scope of their employment would appear to be no more a violation of the Act than would such inducement by their own

union. As a matter of fact, in this case it seems clear that the parties to the contract intended to exclude the handling of hot cargo from the employees' scope of employment for the "hot cargo" clause provides that

> Members of the Union shall not be *allowed* to handle or haul freight to or from an unfair company, ... [Emphasis supplied.]

This language may be construed as constituting the refusal to handle hot cargo as more of a *duty* than a privilege. That is, it expressly prohibits such activity and therefore may be considered as imposing a duty upon the employees not to handle hot cargo. How can it be held that another union that requested the employees covered by such a contract not to do that which they are *prohibited* by contract from doing, thereby has violated the law?"

Three courts have passed on the precise question of whether a non-contracting union can use the "hot cargo" clause of the contracting union. The court below, by a divided vote, held that it was not available. On the other hand, the United States District Court for the Western District of Oklahoma (Civil Case No. 6428, Unreported), in the 10(1) proceeding in this case, took the contrary view and held that it was available. In *Douds* v. *Local 707, etc., International Brotherhood of Teamsters*, S.D.N.Y., September 24, 1957 (Herlands, J.), 33 Labor Cases Para. 70,984, an intermediate position was taken to the effect that the "hot cargo" clause was available to the non-contracting union after the contracting union had agreed to invoke such clause.

The heart of the issue was succinctly put by Judge

Washington in his dissenting opinion below. He stated (R. 203-204):

> "It is true that the Machinists are not a party to the contract which contains the "hot cargo" clause, and not a third-party beneficiary of it. But this does not mean that the existence of the clause has no effect on the lawfulness of the Machinists' conduct. The clause is evidence of the advance consent of the trucking companies that their employees are to refrain from handling struck goods. Because the employers have given this consent and because no basis appears in the statute for permitting this consent to be revoked on an ad hoc basis, the efforts of the contracting union (the Teamsters) to induce employees of the trucking companies to comply with the clause are upheld. The reasoning must be that what is being induced is not a "strike or refusal to work" with an object of "forcing" or "requiring" an employer to cease doing business with another person within the meaning of Section 8(b)(4)(A). This being so, I cannot agree that what is being induced *is* within the meaning of the statute when the inducing is done by the primary employees, the Machinists. The operative effect of the employers consent is, in my view, the same regardless of who it is that reminds the secondary employees of the terms of their contract, and seeks to induce compliance with it."

Although the Petitioner may not be a third-party beneficiary to the "hot cargo" clause contained in the Teamsters' agreement in a conventional contract sense, the Petitioner is certainly an intended beneficiary of the "hot cargo" clause in a realistic labor relations sense. It is evident that "hot cargo" clauses exist for the very purpose of assisting other unions which for one reason or another have labor disputes

with their respective employers. The Teamsters negotiated these "hot cargo" clauses to benefit either other Teamster locals or other labor organizations and, in fact, their primary purpose is to allow the Teamster members to assist other unions. The carriers were well aware when agreeing to the "hot cargo" clauses that they were consenting in advance that their employees would not be required to handle "hot" or "struck" goods regardless of the ownership of such goods; the carriers, in essence, consented in advance to their employees' refusal to handle goods from such employers as American Iron when they were in the throes of a strike. Accordingly, by picketing American Iron vehicles at the common carriers' docks, the pickets of the Petitioner notified the common carriers' employees that the goods they were handling were "hot goods". At that point, the common carriers' employees, knowing that these goods were "hot" or "struck", also knew they were not allowed to handle this work. It follows that after such notification of the status of American Iron's goods, the handling of it was removed from the course of the employment. Accordingly, there could be no violation of Section 8(b)(4)(A) by Petitioner since the elements necessary to a finding of such violation were not in existence, namely, there was no strike or concerted refusal to handle such goods within the course of the secondary employees' employment, and no forcing or requiring the cessation of business with American Iron, since the carriers had in advance agreed to that cessation.

The Respondent in its brief (p. 58) cites *Douds* v. *Local 707, etc., International Brotherhood of Teamsters*, S.D.N.Y., September 24, 1957 (Herland's J.),

in which the court found that a union other than the contracting union, in the circumstances of that case, had no right to rely upon the "hot cargo" clause. The court stated in that case that the secondary employees and their union must be protected against intermeddlers. However, as pointed out previously, the Petitioner in this case is not an intermeddler because the "hot cargo" clause was for the benefit of the Petitioner and other unions when they were engaged in a strike or concerted activity against an employer using the services of the various common carriers. Further, the "hot cargo" clause in the *Douds* case gave the option to the union and its members to refuse to handle unfair goods, while the clause in this case prohibited the members of the union from handling unfair goods. Therefore, the handling of such goods was removed from the course of the secondary employees' employment without the need of the exercise of any option on the part of the contracting union. Finally, all that Judge Herland found was that before a noncontracting union could rely upon the "hot cargo" clause, there need be a showing that the contracting union agreed to invoke the clause. Such agreement is clearly shown by the record in this case. Both the Petitioner and the Teamsters were in complete accord in their common desire to invoke the "hot cargo" clause.

CONCLUSION

For the reasons stated, the judgment of the court below should be reversed and the cause remanded with directions to set aside the Board's Order.

Respectfully submitted,

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No. 324

In the Supreme Court of the United States

OCTOBER TERM, 1957

LOCAL 850, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

This petition arises out of the same case as does the petition filed by the Board in No. 273. The opinion of the court below (Pet. 11a-22a) is not yet reported. The findings of fact, conclusions of law, and order of the Board (R. 63-67, 26-61) [1] are reported at 115 NLRB 800.

JURISDICTION

The judgment of the court below (Pet. 23a-24a) was entered on May 9, 1957, and its decree (Pet. 25a-28a) issued on June 7, 1957. The jurisdiction of

[1] "R" references are to the Joint Appendix filed in the court below.

this Court is invoked under 28 U.S.C. 1254 and Section 10(e) of the National Labor Relations Act, as amended, 61 Stat. 147, 29 U.S.C. 160(e).

QUESTIONS PRESENTED

1. Whether the petitioner union's inducement of employees not to handle goods, which would otherwise be proscribed by Section 8(b)(4)(A) of the National Labor Relations Act, as amended, is lawful because another union representing such employees had agreed with their employer by contract that the employees should not be required to handle "unfair goods."

2. Whether substantial evidence supports the Board's conclusion that the petitioner union's inducement of these employees was not in any event primary activity which falls outside the purview of Section 8(b)(4)(A).[2]

3. Whether the Board proceeding was rendered moot by a settlement of the underlying labor dispute.

STATUTE INVOLVED

The pertinent provision of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), is as follows:

SEC. 8. * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

[2] Although the statement of questions presented in the petition (p. 2) does not list this as a separate question, it is apparent from other portions of the petition (p. 10, "5") that it is subsumed under petitioner's question 1.

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * *

STATEMENT

The Board's findings and conclusions, and the decision of the court below are fully set forth in the Board's petition in No. 273 (pp. 3-6). They are restated here only insofar as they require amplification in the light of the questions presented in the present petition.

A. The Board's Findings and Conclusions

1. *Petitioner's activity at the carriers' docks*

On September 15, 1954, petitioner, the bargaining representative of the production and maintenance employees of the American Iron and Machine Works, called a strike at that Company's three plants in Oklahoma City, Oklahoma. Petitioner set up picket lines at each of the plants, and continued to picket there throughout the strike (R. 31; 128-130). The picketing deterred the five motor carriers normally servicing American Iron from making pick-ups and de-

liveries at its premises, whereupon the Company began to haul its freight in its own trucks to the loading platforms of the motor carriers for shipment (R. 32; 118).

Petitioner followed the American Iron trucks to the premises of the motor carriers, and picketed them while they remained there (R. 32; 124-125). The signs worn by the pickets did not name American Iron, stating simply that petitioner was on strike (R. 32; 113). Petitioner admittedly intended that this picketing would induce the carriers' employees not to "get on the American Iron equipment and handle the freight" (R. 124-125, 119).

In addition to picketing the American Iron trucks at the carriers' docks, petitioner expressly requested employees of the motor carriers not to handle American Iron freight. Thus, at the dock of carrier Time, petitioner's Business Representative Foster, in the hope that Time employees "wouldn't get in the truck and be handling the stuff," informed a Time steward that petitioner had "a picket on a hot load of material out here" (R. 39; 123-124). Robert Pickett, a picket captain for petitioner, stated to Troxel, a dock steward for carrier Santa Fe, "Well, I hope you boys observe our picket and help us out" (R. 37; 159-160). Moreover, when an American Iron truck arrived at the dock of carrier Hall, petitioner's Business Representative Foster told a Hall employee, who was prepared to assist in unloading freight on the truck, that "he couldn't help," and the employee immediately stopped (R. 39-40; 111). Similarly, on the arrival of such a truck at the Lee Way dock, petitioner's agent

Pickett told William Hall, a Lee Way dock steward, that he "shouldn't" handle the freight on the truck (R. 40; 137).

Another union, General Drivers Local No. 886, was, at all times relevant herein, the collective bargaining representative of the employees of the motor carriers. Its contract with each of the motor carriers contained the following "hot cargo" clause (R. 41-42; 140, 187):

ARTICLE 4

* * * *

(b) Members of the Union shall not be allowed to handle or haul freight to or from an unfair company, provided this is not a violation of the Labor Management Relations Act of 1947.

As shown in the Board's petition in No. 273 (p. 4), Local 886 aided petitioner by invoking this clause and directing the carriers' employees not to handle American Iron freight.

The Board, with two members dissenting, concluded that petitioner's picketing and allied activities at the carriers' docks was violative of Section 8(b)(4)(A) of the Act (R. 65). In the light of petitioner's direct appeals to secondary employees, the failure of its picket signs to specify American Iron as the target of its dispute, and the fact that American Iron's separate premises afforded ample opportunity for picketing the primary employer there (R. 65, 34-35), the Board rejected petitioner's contention that its activity at the docks did not have a secondary object, but was merely an incident of legitimate primary activity directed against American

Iron. The Board also rejected petitioner's further contention that its activity at the docks was privileged on account of the "hot cargo" clause in Local 886's contracts with the Carriers (R. 64, 65, n. 5, 36).

2. *The mootness contention*

Petitioner's strike against American Iron started on September 15, 1954, and the charges initiating the Board proceeding were filed on September 23 and 24 (R. 2, 11). On October 21, two days before a complaint issued on the charges (R. 8, 15), petitioner and American Iron entered into a new contract, whereupon the strike and the attendant picketing ended (R. 31). Petitioner contended that these developments rendered the Board proceeding moot and it should thus have been dismissed by the Board. The Board rejected this contention on the ground that, under settled principles, the voluntary cessation of unfair labor practices does not deprive the Board of power to bar a recurrence of those practices by adding the sanction of a Board order (R. 31).

B. The Decision of the Court Below

The court below (with one judge dissenting) sustained the Board's unfair labor practice finding and order with respect to petitioner. The court held that, although the "hot cargo" clause in the carriers' contract with Local 886 immunized that union's inducement of the carriers' employees from the ban of Section 8(b)(4)(A),[3] the clause afforded no protection

[3] This holding is the subject of the Board's petition in No. 273.

to petitioner since it was neither a party to, nor otherwise connected with, the contract (Pet. 17a). Respecting petitioner's other contentions, the court held that: (1) there was "substantial evidence" to support the Board's finding that the picketing at the carriers' docks was aimed at the carriers' employees and thus not legitimate primary activity; and (2) the cessation of the strike did not render the proceeding moot, for orders dealing with unfair labor practices have "preventive as well as remedial effects" (Pet. 18a).

DISCUSSION

1. The Board does not oppose the petition for certiorari insofar as it relates to the first question, namely, whether a hot cargo agreement immunizes from the proscription of Section 8(b)(4)(A) secondary boycott activity by a union which is not a party to the agreement. In *Local 1976, United Brotherhood of Carpenters etc.* v. *National Labor Relations Board* and *National Labor Relations Board* v. *General Drivers etc.*, Nos. 127 and 273, respectively, this Term, both of which are pending on petitions for writs of certiorari, the question is whether a hot cargo agreement immunizes such conduct by a union that is a party to the agreement. The two questions are obviously closely related. Accordingly, we believe that, if the Court grants review in Nos. 127 and 273, the petition here should also be granted with respect to the first question presented.

2. With respect to the other two questions presented by this petition, neither of them raises issues warranting further review by the Court.

Petitioner's contention that its inducement of the carriers' employees was nevertheless lawful as an incident of legitimate primary picketing against American Iron (Pet. p. 10, "5") presents merely a question of evidence. The court below correctly concluded that "there is substantial evidence to sustain the findings of the Board" (Pet. 18a; see also, pp. 4-5, *supra*) and there is no reason to depart from the normal rule that factual issues are not reviewed by this Court. *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502-503.

Petitioner's further contention (Pet., p. 10, "4") that the Board proceeding was rendered moot by a settlement of the underlying dispute is clearly insubstantial in the light of settled authority. Discontinuance of unfair labor practice conduct does not preclude the Board from barring its resumption in the future. *National Labor Relations Board* v. *Mexia Textile Mills, Inc.*, 339 U.S. 563, 567-568; *National Labor Relations Board* v. *Pool Manufacturing Co.*, 339 U.S. 577, 581-582; *National Labor Relations Board* v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217, 225; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261, 271.

CONCLUSION

The Board does not oppose the grant of certiorari limited to the first question presented.

Respectfully submitted,

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